



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



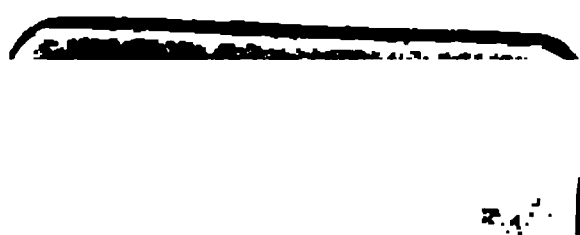
411

L.L.

CW.U.K. !

100

H.M.S.











THE  
EXCHEQUER REPORTS.

---

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

*Courts of Exchequer & Exchequer Chamber.*

VOL. IV.

HILARY TERM, 22 VICT., TO TRINITY VACATION, 23 VICT.,  
BOTH INCLUSIVE.

---

BY

E. T. HURLSTONE, OF THE INNER TEMPLE,

AND

J. P. NORMAN, OF THE INNER TEMPLE,

ESQUIRES, BARRISTERS-AT-LAW.

---

LONDON:

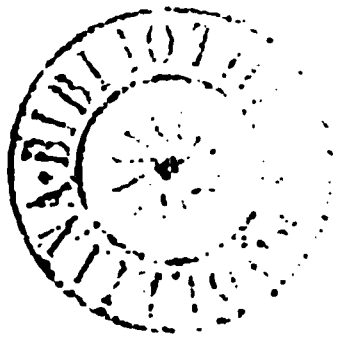
H. SWEET, W. MAXWELL, AND V. & R. STEVENS & G. S. NORTON,

*Late Booksellers and Publishers.*

HODGES, SMITH & Co., GRAFTON STREET, DUBLIN.

---

1860.



LONDON  
RAYNER AND HODGES, PRINTERS,  
109. Fetter Lane, Fleet Street.

J U D G E S

OF THE

C O U R T   O F   E X C H E Q U E R,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

---

The Right Honourable Sir FREDERICK POLLOCK, Knt., Chief Baron.

BARONS.

Sir SAMUEL MARTIN, Knt.  
Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.  
Sir WILLIAM HENRY WATSON, Knt.  
Sir WILLIAM FRY CHANNELL, Knt.

---

ATTORNEYS-GENERAL..

Sir FITZROY KELLY, Knt.  
Sir RICHARD BETHELL, Knt.

---

SOLICITORS-GENERAL.

Sir HUGH M'CALMONT CAIRNS, Knt.  
Sir HENRY SINGER KEATING, Knt.



A TABLE  
OF THE  
NAMES OF THE CASES REPORTED  
IN THIS VOLUME.

	PAGE		PAGE
ABINGTON, Cornish <i>v.</i> -	549	Betts <i>v.</i> Burch -	506
Allaway <i>v.</i> Wagstaff -	307	Bibby <i>v.</i> Carter -	153
—— <i>v.</i> ——— -	681	Binet <i>v.</i> Picot -	365
Allgood, Tancred <i>v.</i> -	438	Birkett <i>v.</i> Whitehaven Junction Railway Company	730
Attorney General <i>v.</i> Baker and Platt -	19	Blackpool Board of Health <i>v.</i> Bennett -	127
—— <i>v.</i> Barry	470	—— <i>v.</i> Kenyon -	127
—— <i>v.</i> Brun-		Boyce, Snodin <i>v.</i> -	391
ning -	94	Bristol and Exeter Railway Company, Garton <i>v.</i> -	33
—— <i>v.</i> Sulley	769	—— In Error -	831
Baddeley, Coward <i>v.</i> -	478	Broadbent, Liversidge <i>v.</i> -	603
Bagshaw, Bedford <i>v.</i> -	538	Brook, Collins <i>v.</i> -	270
Baker, Attorney General <i>v.</i> -	19	Brooks <i>v.</i> Hodgkinson and Butt -	712
Barber <i>v.</i> Pott -	759	Broomhead, Henderson <i>v.</i> -	569
Barry, Attorney General <i>v.</i> -	470	Brown, Metropolitan Counties and General Assurance Company <i>v.</i> -	428
Barsby, Burnaby <i>v.</i> -	690	—— <i>v.</i> Robins -	186
Batson <i>v.</i> King -	739	Browne <i>v.</i> Hare -	822
Baxendale <i>v.</i> Harvey -	445	Brunning, Attorney General <i>v.</i> -	94
Bedford <i>v.</i> Bagshaw -	538		
Bellhouse <i>v.</i> Mellor -	116		
Bennett, Blackpool Board of Health <i>v.</i> -	127		

	PAGE		PAGE
Burch, Betts v. -	- 506	Fletcher and Another v. The	
Burnaby v. Barsby -	- 690	Great Western Railway	
		Company - - -	242
		Fox, Hill v. - - -	359
Carter, Bibby v. -	- 153		
—— v. Crick -	- 412		
Cave, Collins v. -	- 225	Garton v. The Bristol and	
Cheveley, Goodwyn v.	- 631	Exeter Railway Com-	
Clift, Phillips v. -	- 168	pany - - -	33
Coleman, Griffin v. -	- 265	—— v. ————	
Collins v. Brook -	- 270	In Error - - -	831
—— v. Cave -	- 225	General Steam Navigation	
Cook v. Paxton -	- 368	Company, Corbett v. -	482
Corbett, In re -	- 452	Gilbertson v. Richards -	277
—— v. The General Steam		Godwin v. Culley -	373
Navigation Company -	482	Goe, Walker v. -	350
Cornish v. Abington -	- 549	Goodwyn v. Cheveley -	631
Cornman v. The Eastern		Great Western Railway Com-	
Counties Railway Com-		pany, Fletcher v. -	242
pany - - -	- 781	Griffin v. Coleman -	265
Coward v. Baddeley -	- 478	Grinham v. Willey -	496
Crick, Carter v. -	- 412		
Culley, Edwards v. -	- 373		
—— Godwin v. -	- 373	Hall, Reynolds v. -	519
Cuthbertson v. Irving -	- 742	Hardcastle v. The South York-	
		shire Railway and River	
		Dun Company - - -	67
Davis, Roles v. -	- 484	Hardon and Another v. Hes-	
Davys, app., Douglas, resp. -	180	keth - - -	175
Darell, Sturgis v. -	- 622	Hare, Browne v. -	822
Dick v. Tolhausen -	- 695	Harris and Others, Assignees,	
Donald, National Guaranteed		&c., v. Rickett - - -	1
Manure Company v. -	8	Harrison v. Hyde -	805
Douglas, resp., Davys, app. -	180	—— v. Taylor -	815
Duckworth v. Johnson -	653	Harvey, Baxendale v. -	445
		—— resp., Thompson, app.	254
		Hawkins, Metropolitan Sa-	
Eastern Counties Railway		loon Omnibus Company	
Company, Cornman v. -	781	v. - - -	87
Eccles, Liverpool Borough		—— v. ————	146
Bank v. -	- 139	Henderson v. Broomhead -	569
Edwards v. Culley -	- 373	Hesketh, Hardon and Ano-	
Eyton, Williams v. -	- 357	ther v. - - -	175
		Hickie v. Rodocanachi -	455
		Hickman v. Machin -	716
Farmer v. Smith -	- 196	Higgins, Langton v. -	402
Fewins v. Lethbridge -	- 418	Hill v. Fox - - -	359

## TABLE OF THE CASES.

vii

	PAGE		PAGE
Hill, Monmouthshire Canal and Railway Company <i>v.</i>	421	Mason <i>v.</i> Tucker -	536
Hodgkinson, Brooks <i>v.</i>	712	Mellor, Bellhouse <i>v.</i>	116
Holbert <i>v.</i> Starkey -	125	——— Proudman <i>v.</i>	116
Horton <i>v.</i> Sayer -	643	Memoranda -	195. 842
Howe <i>v.</i> Scarrott -	723	Metropolitan Counties and General Assurance Com- pany <i>v.</i> Brown -	428
Hughes, Young <i>v.</i>	76	Metropolitan Saloon Omnibus Company <i>v.</i> Hawkins -	146
Hyde, Harrison <i>v.</i>	805	——— <i>v.</i> ———	87
Ince, Parker <i>v.</i> -	53	Midland Railway Company, Mytton <i>v.</i> -	615
Irving, Cuthbertson <i>v.</i>	742	Mills, Wright <i>v.</i> -	488
Janson, Lindsay <i>v.</i> -	699	Monmouthshire Canal and Railway Company <i>v.</i> Hill and Batt -	421
Joel, Paul, Public Officer, &c. <i>v.</i>	355	Moore, Marsden <i>v.</i> -	500
Johnson, Duckworth <i>v.</i>	653	Muggeridge, New Brunswick and Canada Railway and Land Company <i>v.</i>	160
Johnston, Richards <i>v.</i> -	660	——— <i>v.</i> ———	580
Jones <i>v.</i> Williams -	706	Mytton <i>v.</i> The Midland Rail- way Company -	615
Keen <i>v.</i> Priest -	236	National Guaranteed Manure Company <i>v.</i> Donald -	8
Kenyon, Blackpool Board of Health <i>v.</i> -	127	Naylor, Phillips <i>v.</i> -	565
King, Batson <i>v.</i> -	739	New Brunswick and Canada Railway and Land Com- pany (Limited) <i>v.</i> Mug- geridge -	160
Lafone <i>v.</i> Smith -	158	——— <i>v.</i> ———	580
Lancashire and Yorkshire Rail- way Company, M'Manus <i>v.</i> -	327	Nicholson, Semple <i>v.</i> -	298
Langton <i>v.</i> Higgins -	402	Parker, In re -	666
Lethbridge, Fewins <i>v.</i>	418	——— <i>v.</i> Ince -	53
Liverpool Borough Bank <i>v.</i> Eccles -	139	——— Withers <i>v.</i> -	524
Lindsay and Others <i>v.</i> Janson	699	——— Withers <i>v.</i> -	810
Liversidge <i>v.</i> Broadbent -	603	Paul, Public Officer, &c. <i>v.</i> Joel -	355
Machin, Hickman <i>v.</i> -	716	Paxton, Cook <i>v.</i> -	368
M'Kewan <i>v.</i> Rolt -	738	Phillips <i>v.</i> Clift -	168
M'Manus <i>v.</i> The Lancashire and Yorkshire Railway Company -	327	——— <i>v.</i> Naylor -	565
Mant <i>v.</i> Smith -	324	Picot, Binet <i>v.</i> -	365
Marsden <i>v.</i> Moore -	500		

	PAGE		PAGE
Pott, Barber <i>v.</i> - - -	759	Starkey, Holbert <i>v.</i> - - -	125
Price <i>v.</i> Worwood - - -	512	Stillwell <i>v.</i> Ruck - - -	468
Priest, Keen <i>v.</i> - - -	236	Sturgis <i>v.</i> Darell - - -	622
Proudman <i>v.</i> Mellor - - -	116	Sulley, Attorney General <i>v.</i> -	769
Reynolds <i>v.</i> Hall - - -	519	Tancred <i>v.</i> Allgood - - -	438
Richards, Gilbertson <i>v.</i> -	277	Taylor, Harrison <i>v.</i> - - -	815
——— <i>v.</i> Johnston - - -	660	Taylor <i>v.</i> Turnbull - - -	495
Rickett, Harris and Others		Thompson, app., Harvey, resp.	254
Assignees, &c., <i>v.</i> - - -	1	Thornton, Russell <i>v.</i> - - -	788
Roberts <i>v.</i> Smith - - -	315	Tolhausen, Dick <i>v.</i> - - -	695
Robins, Brown <i>v.</i> - - -	186	Tucker, Mason <i>v.</i> - - -	536
Rodocanachi, Hickie <i>v.</i> -	455	Turnbull, Taylor <i>v.</i> - - -	495
Roles <i>v.</i> Davis - - -	484		
Rolt, M'Kewan <i>v.</i> - - -	738		
Ross, Webb <i>v.</i> - - -	111		
Ruck, Stillwell <i>v.</i> - - -	468	Vintners' Company, Solomon	
Russell <i>v.</i> Thornton - - -	788	<i>v.</i> - - - - -	585
Sanderson, Shand <i>v.</i> - - -	381	Wagstaff, Allaway <i>v.</i> - - -	681
Sayer, Horton <i>v.</i> - - -	643	——— <i>v.</i> - - -	307
Scarrott, Howe <i>v.</i> - - -	723	Walker <i>v.</i> Goe - - -	350
——— Sharp <i>v.</i> - - -	723	Webb <i>v.</i> Ross - - -	111
Semple <i>v.</i> Nicholson - - -	298	Whitehaven Junction Rail-	
Shand <i>v.</i> Sanderson - - -	381	way Company, Birkett <i>v.</i> -	730
Sharp <i>v.</i> Scarrott - - -	723	Willey, Grinham <i>v.</i> - - -	496
Smith, Farmer <i>v.</i> - - -	196	Williams <i>v.</i> Eyton - - -	357
——— Lafone <i>v.</i> - - -	158	——— Jones <i>v.</i> - - -	706
——— Mant <i>v.</i> - - -	324	——— <i>v.</i> Smith - - -	559
——— Roberts <i>v.</i> - - -	315	Withers <i>v.</i> Parker - - -	524
——— Williams <i>v.</i> - - -	559	——— <i>v.</i> —— - - -	810
Snodin <i>v.</i> Boyce - - -	391	Worwood, Price <i>v.</i> - - -	512
Solomon <i>v.</i> The Vintners'		Wright <i>v.</i> Mills - - -	488
Company - - -	585		
South Yorkshire Railway and			
River Dun Company,			
Hardcastle <i>v.</i> - - -	67	Young <i>v.</i> Hughes - - -	76

## ERRATA.

Page 38, line 12 from top, *insert* "the" between "in" and "same."

Page 39, line 1, *insert* "extra" between "no" and "risk."

Page 41, line 13 from top, *delete* "not."

Page 81, line 6 from top, *insert* "when" between "that" and "the," and *delete* "when" in the following line.

# Exchequer Reports.

HILARY TERM, 22 VICT.

HARRIS and Others, Assignees of FORMAN, a Bankrupt,  
v. RICKETT.

1859.

Jan. 31.

**T**ROVER for household furniture, stock in trade, &c. of the plaintiffs, as assignees of Forman, a bankrupt.

Plea, that the goods were not the goods of the plaintiffs. Whereupon issue was joined.

At the trial, before *Cockburn*, C. J., at the last Lincolnshire Summer Assizes, it appeared that the action was brought to recover the value of certain goods conveyed to the defendant by the bankrupt by a bill of sale dated the 14th of April, 1858. The bankrupt proved that in the month of January the defendant agreed to lend him 200*l.*; which he did. After the bankrupt had received all the money, on the 17th of February, he signed and handed to the defendant three several documents.—First, a promissory note for 200*l.*, payable on demand, with interest at 5*l.* per cent.

A trader being indebted to various persons procured from A. an advance of 200*l.*, for which he verbally agreed to give a bill of sale of all his property if called upon to do so. On receiving the money he gave to A. a promissory note for 200*l.*, a memorandum of agreement to assign some property expectant on the death of his wife's father, together with a policy of insurance, and also another

memorandum of agreement to pay 10*l.* yearly as bonus. At a later period, on being requested, he executed a bill of sale of all his property to A. — *Held*: First, that such bill of sale having been executed in pursuance of the original agreement was not an act of bankruptcy.—Secondly, that evidence of the original verbal agreement was admissible, inasmuch as the subsequent written agreement did not contain and was not intended to contain the whole agreement between the parties.

1859.  
  
 HARRIS  
 v.  
 RICKETT.


Secondly, an agreement in substance as follows:—  
 “Memorandum that I, Edward Forman, have this day borrowed of John Rickett the sum of 200*l.*, and have secured the repayment thereof, with interest after the rate of 5*l.* per cent. per annum, by my promissory note; and for better and effectually securing the same and interest I do hereby, for myself, my heirs, &c., promise and undertake to make, execute and deliver unto the said John Rickett, when thereunto requested, a valid and effectual mortgage, transfer, or assignment of the estate and monies expectant on the decease of my wife’s father, for the said sum of 200*l.* and interest; such mortgage, transfer, or assignment to contain a power of sale and other usual powers, &c.: And for better securing the said sum of 200*l.* and interest as aforesaid I further undertake to assign and transfer a policy of insurance effected on the joint lives of myself and my said wife, and the life of the survivor of us, in the British Equitable Assurance Company, for the sum of 300*l.*, when required by the said John Rickett,” &c.

Thirdly, a “Memorandum that I, Edward Forman, have this day borrowed of John Rickett the sum of 200*l.*, and have secured the repayment thereof, with interest after the rate of 5*l.* per cent. per annum, by my promissory note. Now I do hereby undertake to allow to the said John Rickett, his heirs, &c., in addition to the said interest, the further sum of ten pounds as a bonus yearly and every year during so long a time as the said principal sum of 200*l.* shall remain due and owing.”

On the 12th of April the defendant requested Forman to give a bill of sale, which he eventually did. It was in substance as follows:—“Whereas Edward Forman is now indebted to the said J. Rickett in 211*l.* 15*s.*, and the said Edward Forman hath agreed to secure the repayment thereof, and also of any further monies in which the said Edward For-

man may hereafter become indebted to J. Rickett, in manner hereinafter mentioned: Now this indenture witnesseth that in pursuance of the said agreement, and in consideration of 5s., &c., the said Edward Forman doth by these presents grant, bargain, sell and assign to the said J. Rickett all and every the household goods, &c., furniture and effects now being, or which shall hereafter be, in, upon or about the messuage or dwelling-house, shop and premises now occupied by the said E. Forman, and situate in Wide Bargate, &c., and all and every the book and other debts &c. due to the said E. Forman, and all other the personal estate whatsoever of or to which the said E. Forman is now, or from time to time and at all times hereafter, so long as any monies shall remain due and payable to the said J. Rickett, his executors &c. by virtue of these presents, shall be possessed, with full powers, &c. Provided nevertheless that in case the said E. Forman shall on demand pay to the said J. Rickett the said sum of 211*l.* 15*s.*, &c., then these presents shall be absolutely void," &c. Possession was taken by the defendant under the bill of sale on the 17th of April, and on the 21st Forman signed a declaration of insolvency. On cross-examination, the bankrupt stated that he had objected to give a bill of sale because it would affect his credit; but he ultimately admitted that, on the 17th of February, he had promised to give a bill of sale rather than that the defendant should lose his money. The defendant, and two witnesses called by him, stated that before any money was advanced the bankrupt had agreed to give a bill of sale whenever he was called upon to do so.

Upon these facts the learned Judge left it to the jury to say whether when the money was advanced the bankrupt had promised to give a bill of sale, and told them that if they thought there was an agreement to give it intended by the parties to be binding, they should find for the

1859.  
  
 HARRIS  
 v.  
 RICKETT.

1859.  
  
 HARRIS  
 v.  
 RICKETT.

defendant; but, if not, the plaintiffs would be entitled to the verdict. The jury having found a verdict for the defendant, leave was reserved to the plaintiffs to move to enter a verdict for them, upon the grounds that the bill of sale was an act of bankruptcy, and that the verbal promise to give such bill of sale was not, under the circumstances, admissible in evidence or available to prevent the bill of sale from operating as an act of bankruptcy.

*Hayes*, Serjt., having obtained a rule nisi accordingly,

*Macaulay* shewed cause (a).—First, it was not found as a fact by the jury that the effect of this transaction was to defeat or delay creditors. It may be said that where all the property of a bankrupt is assigned to secure a bygone debt, such is the necessary effect of the deed; but it is otherwise where the assignment is in consideration of an advance of money. There the money received is available in payment of the bankrupt's debts. In such case it lies on the party desiring to impeach the assignment to shew that it is fraudulent. The case of *Hutton v. Cruttwell* (b) shews that where an assignment is executed in pursuance of an agreement, the assignor at the time of the agreement having received an adequate consideration, the assignment will be valid though executed subsequently. *Graham v. Chapman* (c) does not resemble the present case, because there the deed gave to the creditor an instant right to seize everything, including the sum just advanced. As to the second point, there is nothing in the giving of the promissory note and the two agreements, or in the terms of those agreements, inconsistent with the original agreement to

(a) In Michaelmas Term, November 19. Before *Pollock*, C. B., *Bramwell*, B., *Watson*, B., and

*Channell*, B.

(b) 1 E. & B. 15.

(c) 12 C. B. 85.

give a bill of sale when required, upon the faith of which the money was advanced.

1859.

HARRIS

v.

RICKETT.

*Hayes*, Serjt., and *Field*, in support of the rule.—The bill of sale recites an existing debt due from the bankrupt to the defendant, and is an assignment of all the bankrupt's goods to satisfy that debt. One question, therefore, is whether *Hutton v. Cruttwell* (a) was rightly decided. But however that may be, in that case it was found as a fact that the assignment was not intended to defeat and delay creditors. [*Bramwell*, B.—That is immaterial. The Courts have held that the intent is a matter of law under such circumstances.] In *Hutton v. Cruttwell* (a) there was an advance and an agreement to give a bill of sale; when the bill of sale was given according to this stipulation, the Court held that its effect was the same as if it had been executed at the time of the advance. Here, after the money was advanced and the agreement entered into, viz. on the 17th of February, three other securities were given. It is not found that this was done in pursuance of any agreement. The written agreement then entered into with respect to the assignment of the policy is inconsistent with the verbal agreement sought to be set up. Evidence of the verbal agreement that the whole, and not merely a part, of the bankrupt's estate was to be assigned would vary and contradict the written instrument. *Meres v. Ansell* (b) is an authority that such evidence is not admissible. [*Bramwell*, B.—It does not appear that the parties intended that the written agreement of the 17th of February should be the entire agreement, but only part of it. An agreement to assign part is not inconsistent with an agreement to assign the whole of the bankrupt's property.] Here there has been something more than a specific performance of the verbal

(a) 1 E. &amp; B. 15.

(b) 3 Wils. 275.

1859.  
 HARRIS  
 v.  
 RICKETT.

agreement. [*Pollock*, C. B.—This case might perhaps be compared to that of a bill of exchange, which, if handed over by a bankrupt to a creditor before bankruptcy, may be indorsed by the bankrupt afterwards. There, however, an equitable interest is given to the creditor by the delivery of the bill, and the assignees take nothing but that which the bankrupt is equitably as well as legally entitled to.] The plaintiffs represent the bankrupt, and are bound by the admissions which would have bound him. [*Bramwell*, B.—The assignees are claiming adversely to the bankrupt: why should they be bound by his written admission?—He referred to *Rex v. Scammonden* (a).]

*Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—In this case the plaintiffs sued as assignees of Forman, a bankrupt, and claimed certain goods and chattels as such assignees. The facts were, that the bankrupt had executed a bill of sale to the defendant of the property in question, which, however, being for an antecedent debt, and being a conveyance of all the bankrupt's property, was *primâ facie* an act of bankruptcy, and therefore void. But the defendant contended, and the jury found, that at the time of the loan which constituted the debt, it had been agreed between the bankrupt and the defendant that this security should be given. If so, the case of *Hutton v. Cruttwell* is an authority to shew that the assignment was valid. But the plaintiffs contended that it was not open to the defendant to prove this, or that the proof, when made, was unimportant. The facts that gave rise to the contention were as follows. The loan was agreed on, and the jury found that, at the time of the

(a) 3 T. R. 474.

agreement for the loan and as part of it, it was agreed that this bill of sale should be given. The giving of the bill of sale, however, was postponed, from the bankrupt's unwillingness to have it registered; and when the money was actually lent three documents were signed by the bankrupt: first, a promissory note; secondly, an agreement to pay 10*l.* per annum as bonus; thirdly, an undertaking to give an assignment of a policy of insurance and some other security, not mentioning this bill of sale. It was therefore urged that this last writing was all that bound the parties; that it could neither be added to nor varied, and consequently there was, in point of law, no antecedent agreement to give the bill of sale.

1859.  
HARRIS  
v.  
RICKETT.

To this argument we do not assent. It is not necessary to say whether an agreement is conclusive between any but the parties to it and those who claim under them, nor whether the assignees in this case claimed under the bankrupt, nor whether the rule applies when fraud or illegality is to be avoided; but we are of opinion this rule should be discharged, on the ground that the writing does not contain, and was not intended to contain, the entire obligation of the bankrupt.

The jury have found that it was agreed to give the bill of sale; they have not found, nor does it appear to us, that the writing was intended to contain the whole agreement, and we are of opinion that the rule relied on by the plaintiffs only applies where the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agreement. The rule must therefore be discharged.

Rule discharged.

---

1859.

Jan. 13.

THE NATIONAL GUARANTEED MANURE COMPANY  
(LIMITED) v. DONALD and Another.

A Company incorporated by act of parliament for the purpose of making and maintaining a canal, and having powers under their Act to take water for the purpose of supplying the canal cannot by user acquire, under the 2 & 3 Wm. 4, c. 71, s. 2, a prescriptive right to take the water for any other purpose.

An easement to take water to fill a canal ceases when the canal no longer exists.

By 59 Geo. 3, c. xiii., a Company was incorporated

for the purpose of making a canal, and empowered to supply the canal with water from certain rivers. In 1824 the canal Company made a cut and erected on it a water wheel for pumping water into the canal. The canal Company occasionally used the water wheel to drive a bone crushing mill. In 1853 the 16 & 17 Vict. c. cxix., for converting the canal into a railway, after repealing the 59 Geo. 3, c. xxii., reincorporated the Company for the purpose (inter alia) of making the railway. By section 10, it was enacted that easements, &c., vested in the canal Company, should after the passing, &c., be vested in the Company thereby incorporated for their absolute benefit. By section 11, that all "titles by possession" acquired, &c., by the canal Company should be as good in favour of the Company thereby incorporated as the same were good immediately before the passing of that Act in favour of the canal Company." The 83rd section provided, that in case any of the works, &c., used for the purposes of the canal should in consequence of the stopping up of the canal be no longer required for the purposes of the Act, the works which should be no longer required might be sold by the Company in the manner provided by the Lands Clauses Consolidation Act, 1845, with respect to the sale of superfluous lands. The canal having been stopped up and converted into a railway:—*Held*, that on the conversion of the canal into a railway the right of the Company to the flow of water in the cut for driving the wheel ceased, and that the railway Company could not convey to a purchaser any right to such flow.

THE declaration stated that the plaintiffs were possessed of certain land and a wheel house and a water wheel, and were entitled to the flow of a cut and stream of water for working the said water wheel; and the defendants, by wrongfully raising a sluice, diverted the water of the cut away from the said land and from the water wheel &c.

Pleas (inter alia):—Thirdly, that the plaintiffs were not entitled to the flow of the said stream of water.—Issue thereon.

At the trial, before *Martin*, B., at the last Carlisle Summer Assizes, it appeared that the action was brought by the plaintiffs for the diversion by the defendants of the waters of a certain cut. The defendants were the owners of a mill called the Willow Holme Mill, situate on the Little Caldew, a diversion of the river Caldew, and which fell again into the Caldew. In 1819 an Act was passed (59 Geo. 3, c. xiii.) "for making and maintaining a navigable canal from or

near the city of Carlisle to the Solway Frith," &c. (a). In 1824 the canal Company, for the purpose of obtaining water for the canal, made a cut or channel about a thousand yards in length from the mill race below the defendants' mill to the river Eden, and set up a wheel to pump water into the canal from the Eden at the point where the cut communicated with that river. They let the water wheel at intervals to drive a bone crushing mill, but continued to use it occasionally to pump water into the canal. For the

1859.  
  
 NATIONAL  
 GUARANTEED  
 MANURE  
 COMPANY  
 v.  
 DONALD.

(a) The Act recites that the making and maintaining of a canal for the navigation of boats, &c., from or near the city of Carlisle to the Solway Frith, would be of great public utility, and that the several persons thereafter named were "desirous of being united into a Company for carrying into effect the purposes aforesaid;" and enacts that the several persons, &c., "shall be and they are hereby united into a Company for the making, completing, maintaining and carrying on the said intended canal and other works hereby authorized to be made according to the rules, orders and directions hereinafter expressed; and for that purpose are and shall be one body politic and corporate, by the name and style of 'The Carlisle Canal Company,' &c.; and also shall and may have power and authority from and after the passing of this Act to purchase in manner by this Act directed lands, &c., for the use of the said undertaking and for the several works, &c., without incurring any of the penalties or forfeitures of the statutes of mort-

main." Sect. 2 empowered the Company to make the canal, "and also to supply the said intended canal at all times for ever, while making and after the same shall be made, with water from the river Eden at or near the place marked with the letter (C) upon the said map or plan, and also from the river Caldew at or near the place marked with the letter (D), from all such other brooks, springs, streams, &c., near to the said canal, &c., and also to make water wheels, &c., for supplying the said canal with water.

Sect. 7. "Nothing herein contained shall extend to authorize or empower the said canal Company, in the execution of this Act, to take any of the mills situate in, upon, or near to the line of the said intended canal, or the water in the brooks, streams, or rivulets supplying the same, or any of them, without the consent in writing of the owner, &c., except (inter alia) the mill situate at Willow Holme, &c., belonging or reputed to belong to William Donald, with their appurtenances.

1859.  
 NATIONAL  
 GUARANTEED  
 MANURE  
 COMPANY  
 v.  
 DONALD.

purpose of maintaining the water in the cut at a sufficient height to drive this wheel, they erected a sluice below the defendants' mill to prevent the water in the mill race from falling into the Caldew. When this sluice was down the effect was to dam back the water on the defendants' water wheel. In 1853 an Act was passed (16 & 17 Vict. c. cxix.) "to authorize the abandonment of the Carlisle Canal, and the making of a railway in lieu thereof from the Newcastle upon Tyne and Carlisle Railway at Carlisle to Port Carlisle, to repeal the Acts relating to the Carlisle Railway and Docks, and to reincorporate the Company," &c. (a). After the passing

(a) The 16 & 17 Vict. c. cxix. after reciting (inter alia) the 59 Geo. 3, c. xiii.; that the Company had made and completed the canal; the 6 & 7 Wm. 4, c. lx., "An Act to enable the Carlisle Canal Company to make a dock or docks at Port Carlisle," &c.; that the Company had constructed a dock, &c.; and that it would be beneficial to the proprietors and mortgagees of the said canal and dock and also to the public, if the said canal were converted into a railway, &c.; and that nearly the whole of the line and lands of the said canal can be used for the site of the said railway, &c.; and that for effectuating the objects and purposes aforesaid, &c., it is expedient that further powers should be granted to the Company, and the same could be most conveniently effected if the said recited Acts were repealed and the Company reincorporated, &c., by section 2 repealed the recited Acts, and enacted by s. 3, "that the Lands Clauses Consolidation Act, 1845, &c., shall be incor-

porated with and form part of this Act." By s. 6, that the several persons, &c., "shall be united into a company for the purpose of maintaining and working the docks, &c.; and also, until the same shall be used for the purpose of the railway authorized by this Act, of maintaining and working the canal and works made under the authority of the Canal Act; and also of making, maintaining and working the railway and works by this Act authorized and for the purposes aforesaid;" such persons, &c., shall be incorporated by the name of "The Port Carlisle Dock and Railway Company," and by that name shall be a body corporate and have a common seal with perpetual succession, and shall have power to purchase, hold, sell and dispose of lands for the purposes of the said undertaking so vested in them or authorized by this Act," &c. By sect. 10, "All the docks, basins, &c., cuts, reservoirs, &c., tenements, rights, powers, privileges, exemptions,

of the last mentioned Act the canal ceased to be used as a canal and was converted into a railway under the powers of the Act, except a small portion of it at Port Carlisle; but that portion was not supplied by the pump. In November, 1857, the Port Carlisle Dock and Railway Company granted a lease to the plaintiffs for twenty-one years of "the erection or building formerly used as a steam pumping engine and boiler house, with the chimney belonging thereto, and the other erections and buildings used or occupied as a wheel house erected and built thereon, &c.; together with all such right and liberty of watercourse as the said Port Carlisle Dock and Railway Company is now entitled to in, through, over and along the cut or channel of the said Dock and Railway Company made for the purpose of conveying water from a certain dam or mill

1859.

NATIONAL  
GUARANTEED  
MANURE  
COMPANY  
v.  
DONALD.

easements, hereditaments and real estate whatsoever, and the benefit of all contracts, &c., which were respectively vested in or belonged to the Company incorporated by the Canal Act immediately before the passing of this Act, &c., shall after the passing of this Act be well and effectually vested in and belong to the Company hereby incorporated for their absolute benefit."

Sect. 11. All "grants," "titles by possession and otherwise," &c., acquired, obtained, &c., by "the Company incorporated by the Canal Act, shall from and after the passing of this Act be as good, valid and effectual upon or in favour of, &c., the Company hereby incorporated, as the same respectively were good, valid and effectual immediately before the passing of this Act" in favour of "the Company incorporated by the Canal

Act; and the Company hereby incorporated shall be considered as identical with the Company incorporated by the Canal Act in reference to all such matters," &c.

Section 83. "In case any portions of the canal navigation, or of the reservoirs, lands or works used therewith or for the purposes thereof or belonging to the Company, shall in consequence of the making of the said railway or of stopping up the said canal or any part thereof be no longer required for the purposes of this Act; then, &c., the lands, or the site or portion of the said canal or reservoir, and works which shall be so stopped up or no longer required by the Company, may be sold by the Company in the manner provided by "The Lands Clauses Consolidation Act, 1845," with respect to the sale of superfluous lands, &c.

1859.  
 NATIONAL  
 GUARANTEED  
 MANURE  
 COMPANY  
 v.  
 DONALD.

race &c. to the premises hereby demised; together with all and singular other ways &c., watercourses, easements, privileges, profits, &c.: Except and always reserved out of this demise unto the said Port Carlisle Dock and Railway Company, their successors and assigns, a concurrent right to use the water flowing along the said cut, &c., so as not to interfere with or diminish the use of the said water" to the plaintiffs. From 1857 till June, 1858, the plaintiffs were in possession and used the water wheel so leased to them for their works. But on the 14th of June the defendants raised the sluice and let off the water into the Caldew, thereby stopping the working of the plaintiffs' mill. At that time the water was backed up and interfered with the working of the defendants' mill.

Upon these facts, the learned Judge intimated his opinion that the canal Company had no right, under the 59 Geo. 3, c. xiii., in getting water from the Eden or the Caldew, to back the water on the defendants' mill. And he asked the jury: first, whether they believed that the sluice was raised to enable the defendants to work their mill more efficiently by getting rid of the backwater. Secondly, whether the Company had abandoned the canal. The jury having found these questions in the affirmative, the learned Judge directed a verdict for the defendants, reserving leave to the plaintiffs to move to enter a verdict for them.

*Edward James* having obtained a rule nisi to enter a verdict for the plaintiffs on the third plea, on the ground that through the railway Company the plaintiffs were entitled to the right alleged under the acts of parliament or by user.

*Temple and Udall* now shewed cause.—First, at common law the defendants had a right to get rid of the backwater

below their mill, and there is nothing in the 59 Geo. 3, c. xiii. to prevent them from exercising such right. It was not shewn that they were restrained by any contract made with the Carlisle Canal Company, or that they ever received compensation for the surrender of such right. The 2nd section, which empowered the Carlisle Canal Company to take water from the Eden and the Caldew, does not affect it. The plaintiffs have only the same right to deal with the cut that they would have had at common law. Secondly, whatever right the canal Company may have had under the 59 Geo. 3, c. xiii., such right has not devolved on the plaintiffs. The powers given to the canal Company by that Act were conferred on them for the purposes of the canal, and for no other purpose whatever. The preamble of the 16 & 17 Vict. c. cxix. shews that the object of that Act was that the canal should be converted into a railway. The 10th section may be relied on as shewing that the Port Carlisle Dock and Railway Company have become entitled to all easements which at the time of the passing of that Act were vested in the canal Company. But, by the 11th section, such easements are to be "as good, valid and effectual in favour of the Company thereby incorporated as the same respectively were good, valid and effectual immediately before the passing of that Act in favour of the Company incorporated by the Canal Act," and the Company is to be considered as identical with the canal Company in reference to all such matters. Therefore, assuming that the canal Company had a right to use the water in the cut for the purposes of the canal, and in so doing to back up the water against the defendants' wheel, inasmuch as the railway Company only had the right which the canal Company had, they could not exercise it for any other purpose. Thirdly, the power in the 83rd section of the 16 & 17 Vict. c. cxix. to sell any portion of the works

1859.

NATIONAL  
GUARANTEED  
MANURE  
COMPANY

W.  
DONALD.

1859.

NATIONAL  
GUARANTEED  
MANURE  
COMPANY

v.  
DONALD.

used for the purposes of the canal did not enable the railway Company to sell a right which they did not possess. There is no power to lease, and the Company did not sell under the 8 & 9 Vict. c. 18, s. 127. Fourthly, it is said that, under the 2 & 3 Wm. 4, c. 71, s. 2, the plaintiffs and their predecessors had acquired a prescriptive right to back the water on the defendants by twenty years' enjoyment as of right. But the easement was enjoyed by the canal Company for a particular purpose of public utility; namely for filling the canal. The canal Company never acquired, and therefore could not give as against the defendants, a right for any other purpose. [*Pollock, C. B.*—There is a peculiarity in the case of a corporation created by act of parliament. It exists only for the purposes for which it is created. For instance, if a canal Company have a quantity of water which they do not want, they cannot convert themselves into millers: such a corporation cannot acquire by twenty years' enjoyment the rights which a corporation created by charter or existing by prescription is capable of acquiring under the Prescription Act.] *The Rochdale Canal Company v. Radcliffe* (a) shews that a right by prescription cannot be gained where, if the right had been granted by deed, the deed would have been ultra vires and void.

*Edward James* and *T. Jones*, in support of the rule.—The Carlisle Canal Company had full authority to take the water from the mill. If the works erected for that purpose caused backwater, the canal Company had power to make compensation, and it must be presumed that they did so. The canal Company being in possession of an easement, by the 10th section of the 16 & 17 Vict. c. cxix. the easement became vested in the Company incorporated by that

(a) 18 Q. B. 287.

Act “for their absolute benefit.” The entire interest of the canal Company in the water passed to the railway Company. [*Martin*, B.—Your argument amounts to this, that if the canal was abandoned the railway Company might take the water and supply the city of Carlisle with it.] The easement of taking the water was held by the canal Company as a matter of property. [*Channell*, B.—Suppose the Company, having paid a compensation for the water, possessed such an easement, and suppose that the right vested in the canal Company had passed under the section in question to the railway Company and vested in them for the purpose of sale; unless it is shewn that the railway Company had it for the purpose not merely of selling it under the Lands Clauses Consolidation Act, but of dealing with it in any other way, the plaintiffs have no title to the water.] Section 83 indicates that whatever the canal Company had acquired was to belong to the railway Company, for whatever purpose it might be required. [*Channell*, B.—If the right is preserved it must be enlarged by the 16 & 17 Vict. c. cxix. That is contrary to the spirit of the 83rd section.] It is as reasonable that the railway Company should become entitled to this valuable right to the use of water as that they should retain a property in the site of the canal after the canal ceased to be used. [*Martin*, B.—This was a right to take water for the purpose of a canal: when the canal was abandoned the easement was gone.] As to the claim by prescription, it appears that the water in the cut had been used by the canal Company for the purpose of bone crushing for twenty years. [*Martin*, B.—By the 2nd section of the 2 & 3 Wm. 4, c. 71, though no way or other easement is to be “defeated or destroyed by shewing that such way or other matter was first enjoyed at any time prior to the period of twenty years, nevertheless such claim may be defeated in

1859.

NATIONAL  
GUARANTEED  
MANURE  
COMPANY  
v.  
DONALD.

1559.  
 ~~~~~  
 NATIONAL  
 GUARANTEED  
 MASTER  
 COMPANY  
 v  
 DONALD.

any other way in which the same" was before that statute "liable to be defeated." The old law as to prescription therefore remains intact, except that user may be proved by evidence of enjoyment for twenty years.]

POLLOCK, C. B.—We are all of opinion that the rule must be discharged. The plaintiffs are the lessees of the railway Company, and claim under their lease a right which, as they allege, entitles them to do an act which is injurious to the defendants. The question is, whether the railway Company possessed this right. I think that they did not. The railway Company arose out of a previously existing canal Company. The canal Company had a right to take water for the canal; but the canal had ceased to exist; therefore the right of the canal Company had also ceased. I agree with my brother *Martin*, that if an easement for a particular purpose is granted, when that purpose no longer exists there is an end of the easement. Had our attention been called to the case of *The Rochdale Canal Company v. Radcliffe* (a), probably the rule would not have been granted. That case is a direct authority that a parliamentary corporation is a corporation for those purposes only for which it has been established by parliament, and has no existence for any other purpose, and that whatever is done beyond the scope of such purpose is ultra vires and void. It was urged that an easement was acquired by an uninterrupted enjoyment for twenty years. But it will turn out that no right was conferred by such enjoyment. Prescription stands in the place of a grant, and the railway Company could not have taken by way of grant the powers which they professed to demise to the plaintiffs. The 10th section of the 16 & 17 Vict. c. cxix, was relied on

(a) 18 Q. B. 237.

as shewing that the easement was to vest in the railway Company for their absolute benefit. But this easement was incident to the canal, and when the canal ceased to exist the easement altogether ceased; therefore the verdict on the third plea was right.

1859.  
  
 NATIONAL  
 GUARANTEED  
 MANURE  
 COMPANY  
 v.  
 DONALD.

WATSON, B.—I am of the same opinion. It is clear that if the canal Company had power to take water from the Little Caldew for feeding their canal, they had no power to erect a fence so as to throw the defendant's mill into backwater. Still less had the railway Company such power when the purpose for which the canal Company took the water was at an end. Much less could the railway Company confer such right on the plaintiffs. The right really was to take water from the Caldew. That would increase the fall for the defendants' mill wheel, and it was never contemplated that the water should be thrown back on the wheel.

CHANNELL, B.—This was an application to enter a verdict on the third plea. The declaration alleges that the plaintiffs are entitled to the flow of a stream for working a water wheel. The third plea traverses the right of the plaintiffs to the flow of the stream. The plaintiffs have to make out their title to the water. If we look at this question as depending upon the statutes, we find that the canal Company were entitled to take the water of the Caldew to supply the canal; though I question whether they had a right to take it so as to throw the defendants' mill into backwater. It is not necessary however to decide that point. It may be that they had such right on making compensation: but they had no power to take the water except to supply the canal. The easement was not in perpetuity, but only commensurate with the existence of

1859.  
 ~~~~~  
 NATIONAL  
 GUARANTEED  
 MEASURE  
 COMPANY  
 &  
 DUBLIN.

the canal. By the 16 & 17 Vict. c. cxix., the Company thereby incorporated were authorized to convert the canal into a railway and to dispose of the property of the canal Company not wanted for the purpose of the railway. It was said that the right of the canal Company, which before was limited, was enlarged by this Act, and that the easement continued, though the purpose for which it was enjoyed no longer existed. It would require strong language to induce me to accede to that argument. As to the evidence of user, I agree with the observations of the Lord Chief Baron. The alleged right was one which the corporation had no power to take by grant. A corporation created for a limited purpose has no power or capacity except for that purpose. The authority of the case of the *Rochdale Canal Company v. Radcliffe* (a) appears conclusive on that point.

MARTIN, B.—I thought when the jury found that the canal was abandoned there was an end of the case. I doubt whether what the canal Company did in taking this water was not altogether illegal. The 59 Geo. 3, c. xiii., s. 2, empowered the canal Company to supply the canal with water from the river Caldw at a particular place. The case was argued as if the Company had power to take water from the point at which they did take it. No reservoir was made, but the water of the Little Caldw was taken for purposes altogether different from those mentioned in the Act. The canal Company probably had no right to throw the plaintiffs' mill into backwater. We need not however discuss that. The cut was made, and used for many years. Then came the 16 & 17 Vict. c. cxix., which, by section 10, gave all easements possessed by the canal Company to the railway Company. This easement was to take water for the canal, and when the canal ceased to exist

(a) 18 Q. B. 287.

the easement ceased with it. It is said that we may assume that the user of the water by the canal Company and their tenants of the mill on the Eden was unlawful, and that a right was thereby acquired. I do not mean to give a positive opinion, but I think that when a certain right is given to a corporation created by act of parliament, the right of the Company is limited to that given by the Act, and that such Company cannot acquire a larger right under the Prescription Act. The Prescription Act was intended to prevent old rights from being defeated by proof that they could not by possibility have existed at the period of legal memory. Here the rights of the canal Company are defined by act of parliament.

1859.  
  
 NATIONAL  
 GUARANTEED  
 MANURE  
 COMPANY  
 v.  
 DONALD.

Rule discharged.

THE ATTORNEY GENERAL v. BAKER and PLATT.

Jan. 21.

**T**HIS was an information by the Attorney General for Succession Duty payable by the defendants as trustees of Upon an information by the Attorney General to recover

succession duty, payable in respect of the succession of one E. to a sum of 2000*l.* derived from W. P. as predecessor, a special verdict was found, which stated that J. P. died intestate leaving W. P., his brother; and A. S., the wife of J. H. S., claimed to be a daughter of a sister of J. P. That by indenture, reciting that letters of administration had been granted to W. P., and in order to obviate any doubts or differences which might arise touching any share which J. H. S. or A. S. might be entitled to in the personal effects of J. P., W. P. had proposed and agreed on having a general release from J. H. S. and A. S. to transfer 30,000*l.* to be settled upon trusts for J. H. S. and A. S. and the children of their marriage, to which proposal J. H. S. and A. S. had consented and agreed; that the sum of 30,000*l.* had been directed to be transferred to trustees by W. P., and that J. H. S. and A. S. had that day executed a general release to W. P. of all claims against him as administrator of J. P. or otherwise; it was declared that B. and O. should stand possessed of the 30,000*l.* in trust to pay the interest to J. H. S. for life, and after his death to A. S. for her life, and after the death of the survivor, if there should be an only child in trust for such child, and if there should be two or more children in trust for such children in such shares as J. H. S. and A. S., or the survivor, should appoint; and in case no child should live to attain a vested interest in trust for the survivor of J. H. S. and A. S. absolutely. Contemporaneously with the indenture a release was executed by J. H. S. and A. S. to W. P. There were ten children of the marriage, and J. H. S. and A. S. having appointed a sum of 2000*l.* to E. one of such children, J. H. S. and A. S. died in or before March 1854.—*Held*, that the defendant was entitled to judgment, because it could not be inferred that W. P. was either the sole predecessor of E. within the meaning of s. 2, or a joint predecessor within the meaning of s. 13. *Dubitante Channell, B.*

*Per Watson, B.* that J. H. S. and A. S. were the settlors.

1859.  
ATTORNEY  
GENERAL  
v.  
BAKER.

a certain settlement, in respect of the succession of one E. Pigott, described as a stranger in blood to Wadham Pigott and John Pigott, to the sum of 2000*l.*, such duty being calculated at the rate of 10*l.* per cent. per annum upon the value thereof, and amounting to the sum of 200*l.* The first count alleged that though the defendants had paid 20*l.*, parcel thereof to the Commissioners of Inland Revenue, yet they had not paid the residue of the monies claimed. Second count.—That the defendants are indebted to her Majesty in the sum of 500*l.* for certain other duties under the management of the Commissioners of Inland Revenue; and in the further sum of 500*l.* for money had and received to the use of her Majesty, and for money found to be due from them to her Majesty for divers accountings, &c. Plea.—Not indebted.

A special verdict was taken by consent, which was in substance as follows:—

On the 1st day of January, 1816, John Pigott died intestate, possessed of personal estate and effects exceeding 60,000*l.* and leaving his brother Wadham Pigott; and one Ann Smyth, the wife of John Hugh Smyth, claimed to be a daughter of a sister of the said John Pigott and Wadham Pigott.

On the 12th day of April, 1817, a certain indenture was made by and between the said Wadham Pigott of the first part, John Hugh Smyth and Ann his wife of the second part, and Jeremiah Osborne and the defendant John Baker of the third part. And by the said indenture, after reciting, as the facts were, that John Pigott, the brother of Wadham Pigott, had lately died intestate, and that letters of administration of his goods, chattels and credits, had been duly granted to Wadham Pigott; and that in order to obviate and prevent any doubts or differences which might arise between the parties thereto of the first and

second parts, touching or concerning any rights, shares, or interests of and in the personal estate and effects of John Pigott deceased, which Ann Smyth or J. H. Smyth, in right of Ann Smyth, or in any other right or capacity, had, or might have, or be entitled unto, or set up, or claim against Wadham Pigott in respect thereof; Wadham Pigott had proposed and agreed, upon having a general release, from J. H. Smyth and Ann his wife of all such claims and demands, to transfer the sum of 30,000*l.*, 4*l.* per cent. Consolidated Bank Annuities, in the books of the governor and company of the Bank of England, into the names of trustees, to be settled upon the trusts, for the benefit of J. H. Smyth and Ann his wife and the children of their marriage, thereafter declared; to which proposal J. H. Smyth and Ann his wife had consented and agreed; and that the said sum of 30,000*l.*, Bank Annuities, had been directed to be transferred by Wadham Pigott into the names of J. Osborne and J. Baker, the trustees chosen and appointed for the purposes aforesaid: And that J. H. Smyth and Ann his wife had that day executed to Wadham Pigott a release of all claim and demand which they or either of them had, or could or might hereafter have, against Wadham Pigott, as administrator of John Pigott deceased as aforesaid, or otherwise however, touching, or concerning the personal estate and effects of John Pigott deceased, or of his, Wadham Pigott's, having obtained letters of administration thereto, or by reason of any other matter, cause, or thing, from the beginning of the world until the day of the said indenture: It was declared that J. Osborne and J. Baker should stand possessed of, and interested in the said sum of 30,000*l.*, and the interest, &c., upon the trusts following, namely, upon trust to pay such interest, &c. to J. H. Smyth and his assigns for his own use during his life, and after his death to pay the same

1859.

ATTORNEY  
GENERALv.  
BAKER.

1859.  
—  
ATTORNEY  
GENERAL  
v.  
BAKER.


to Ann Smyth and her assigns, for her own use during her life, and after the death of both of them J. H. Smyth and Ann his wife, then upon trust, that they, J. Osborne and J. Baker, should stand possessed of the said sum of 30,000*l.*, and the interest, &c. upon trust, in case there should be issue of J. H. Smyth on the body of Ann his wife begotten an only child, to pay, &c. to such only child, &c., at such age, &c., and in such manner as in the said indenture is specified; but in case there should be two or more children of J. H. Smyth on the body of Ann his wife begotten, then upon trust to pay, &c. the said sum of 30,000*l.* unto, or between and amongst any one, or more of such children, or the issue of any such children who might happen to die leaving issue, at such age or ages, days or times next after the decease of the survivor of them J. H. Smyth and Ann his wife, in such parts, shares and proportions and with such maintenance in the meantime and under and subject to such conditions, &c., limitations, &c. (such limitations over being for the benefit of some or one of such children or issue) as J. H. Smyth and Ann his wife at any time or times during their joint lives, or as the survivor of them, by any deed or deeds, writing or writings, with or without power of revocation, &c., or as the survivor of them J. H. Smyth and Ann his wife by his or her last will should direct or appoint. And in default thereof, upon trust, to pay the said sum of 30,000*l.* unto and between such children equally, &c. And in case no child should attain a vested interest, then upon trust for the survivor of J. H. Smyth and Ann his wife if then living, or if then dead for his or her executors, administrators or assigns, for his, her, or their own absolute use and benefit.

Contemporaneously with the said indenture a certain other indenture bearing even date therewith, and being the

release referred to therein, was made by and between J. H. Smyth and Ann his wife of the one part and Wadham Pigott of the other part, whereby, after reciting that John Pigott had then lately died intestate, and letters of administration of the goods, chattels and credits of John Pigott had since been granted to Wadham Pigott; and that in order to obviate and prevent any doubts or differences which might arise between J. H. Smyth and Ann his wife, and Wadham Pigott, touching or concerning any rights, shares or interests of and in the personal estate and effects of John Pigott deceased, which Ann Smyth, or J. H. Smyth in her right, or in any other right or capacity, then had, or might have, or be entitled unto, or set up, or claim against Wadham Pigott, for or on account of such personal estate and effects, it had been agreed by and between J. H. Smyth, Ann his wife and Wadham Pigott, that Wadham Pigott should transfer, or cause to be transferred, the sum of 30,000*l.*, Bank Annuities, into the joint names of J. Osborne and J. Baker, in the books of the Governor and Company of the Bank of England kept for that purpose, to be held by J. Osborne and J. Baker upon the trusts to be declared concerning the same in and by a certain indenture bearing even date therewith, and made or intended to be made between Wadham Pigott of the first part, J. H. Smyth and Ann his wife of the second part, and J. Osborne and J. Baker of the third part, being the indenture hereinbefore set forth; and that J. H. Smyth and Ann his wife should join in and execute such release to Wadham Pigott as was in the said indenture of release contained: and further reciting that the sum of 30,000*l.*, Bank Annuities, had been directed to be transferred by Wadham Pigott into the names of the said trustees accordingly: J. H. Smyth and Ann his wife released to Wadham Pigott his heirs &c. all such right, title, interest, property, chal-

1859.

ATTORNEY  
GENERAL  
v.  
BAKER.

1859.  
  
 ATTORNEY  
 GENERAL  
 v.  
 BAKER.

allenge, claim and demand which J. H. Smyth and Ann his wife have, or either of them hath or of right ought to have, of, in, to or out of the monies, goods, chattels and personal estate and effects of John Pigott deceased, and all remedies, both at law and in equity, for recovering the same, and also of and from all and all manner of action and actions, &c., which against Wadham Pigott the said J. H. Smyth and Ann his wife or either of them ever had, then had, or which they, their or either of their heirs, &c., could, should or might thereafter have, for, upon or by reason of John Pigott dying intestate, or of his personal estate and effects, or of the said Wadham Pigott having obtained letters of administration thereto, or by reason of any other matter, cause, or thing from the beginning of the world to the day of the date of the said indenture.—The said sum of 30,000*l.* Bank Annuities was immediately after the making of the indenture, in conformity therewith, duly transferred into the names of J. Osborne and J. Baker as such trustees as in the said first mentioned indenture is mentioned.

There were ten children of the said J. H. Smyth, who afterwards took the name of J. H. Smyth Pigott, on the body of the said Ann his wife begotten, of whom E. Pigott was the third son.

After E. Pigott had attained the age of twenty-one years, and before the passing of “The Succession Duty Act, 1853,” viz. on 21st day of August, 1851, by a deed poll, J. H. Smyth Pigott and Ann his wife, by virtue of the power for that purpose given to them by the indenture, appointed the sum of 2000*l.*, part of the said trust fund, to E. Pigott for his own benefit absolutely, subject only to the life interests of the said John Hugh Smyth Pigott and Ann his wife respectively.

On the 8th of April, 1831, the sum of 30,000*l.*, Bank Annuities, was sold by J. Osborne and J. Baker, and the

proceeds lent at interest by J. Osborne and J. Baker, as trustees, to certain persons on the security of certain lands conveyed to J. Osborne and J. Baker by way of mortgage.

1859.  
ATTORNEY  
GENERAL  
v.  
BAKER.

On the 21st day of September 1851, J. Osborne died, and the said J. Baker survived him, and thereupon J. H. Smyth Pigott and Ann his wife, by virtue of a certain power to them given in that behalf by the said first mentioned indenture to appoint a new trustee of that indenture instead of any trustee thereof who should die, duly appointed T. Platt to be a trustee together with J. Baker; and the said lands held by J. Baker by way of mortgage were conveyed by J. Baker unto and to the use of himself and the said T. Platt and their heirs as trustees.

After the passing of the Succession Duty Act, 1853, J. H. Smyth Pigott and Ann his wife respectively died, viz. on the 26th day of June 1853, and on the 21st day of March, 1854, without revoking or altering the said appointment of the sum of 2000*l.* by them made in favour of E. Pigott.

The defendants, as such trustees as aforesaid, have always since the death of the said Ann Smyth Pigott been possessed of the said sum of 2000*l.* as trustees in trust for E. Pigott according to the said appointment: and the defendants, before the filing of the information, paid to her Majesty the sum of 20*l.*, part of the said sum of 200*l.*, as due to her Majesty for succession duty in respect of the said sum of 2000*l.*, the sum of 20*l.*, being 1*l.* per cent. thereon; but the defendants have refused to pay the further sum of 180*l.* residue of the said sum of 200*l.* claimed to be due to her Majesty for succession duty in respect of the said sum of 2000*l.*, being 10*l.* per cent. on the said sum of 2000*l.*, and which sum of 200*l.* was duly assessed by the Commissioners of Inland Revenue.

1859.

ATTORNEY  
GENERAL  
v.  
BAKER.

*The Solicitor General* (with whom were *Pigott*, Serjt., and *Beavan*), for the Crown.—The question is who is the “predecessor” within the meaning of the 16 & 17 Vict. c. 51. By the 2nd section of that Act “the term predecessor shall denote the settlor, disponent, testator, obligor, ancestor or other person from whom the interest of the successor is to be derived.” From whom then was the interest of *E. Pigott* derived? It will hardly be contended that the appointment by the father and mother, executed in pursuance of the power in the settlement, was such a disposition as made the parents the settlors. The power was derived from the original settlement, and the appointment only determined the amount of *E. Pigott*’s share. It will be contended on the other side that *Ann Smyth* was the settlor. But the test is, who was entitled to the property at the time of the settlement? Who at that time had the *jus disponendi* the absolute control over the property as his own? *Wadham Pigott* proposed, on having a general release, to transfer the stock for the benefit of Mr. and Mrs. Smyth. He said in effect that *Ann Smyth* should have the money, not absolutely, but settled in a particular way. She agreed to do so and took a settlement made by him in lieu of any claim. [*Watson*, B.—*Ann Smyth* bought of *Wadham Pigott* in consideration of the release. Without that release *Wadham Pigott* never would have parted with the money.] Marriages are made for valuable considerations, and the settlors are “settlors” or “predecessors” within this Act. In the ordinary case where an intended husband settles landed property in consideration of marriage, there is a perfectly valid consideration; but the husband is nevertheless the settlor. Therefore, assuming that this settlement was made for a valuable consideration, *Wadham Pigott* must have been the settlor. The nature of the arrangement shews that he was in fact settling and not merely selling.

1859.  
 ~~~~~  
 ATTORNEY  
 GENERAL  
 v.  
 BAKER.

*The Solicitor General* (with whom were *Pigott*, Serjt., and *Beavan*), for the Crown.—The question is who is the “predecessor” within the meaning of the 16 & 17 Vict. c. 51. By the 2nd section of that Act “the term predecessor shall denote the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.” From whom then was the interest of E. Pigott derived? It will hardly be contended that the appointment by the father and mother, executed in pursuance of the power in the settlement, was such a disposition as made the parents the settlors. The power was derived from the original settlement, and the appointment only determined the amount of E. Pigott’s share. It will be contended on the other side that Ann Smyth was the settlor. But the test is, who was entitled to the property at the time of the settlement? Who at that time had the *jus disponendi*, the absolute control over the property as his own? Wadham Pigott proposed, on having a general release, to transfer the stock for the benefit of Mr. and Mrs. Smyth. He said in effect that Ann Smyth should have the money, not absolutely, but settled in a particular way. She agreed to it and took a settlement made by him in lieu of any claim. [*Watson*, B.—Ann Smyth bought of Wadham Pigott in consideration of the release. Without that release Wadham Pigott never would have parted with the money.] Many settlements are made for valuable considerations, and yet the settlors are “settlors” or “predecessors” within this Act. In the ordinary case where an intended husband settles landed property in consideration of marriage, there is a perfectly valid consideration; but the husband is nevertheless the settlor. Therefore, assuming that this settlement was made for a valuable consideration, Wadham Pigott may have been the settlor. The nature of the arrangement shews that he was in fact settling and not merely selling

the property. His controversy was with Mr. and Mrs. Smyth, but he bargained for advantages to the children. It is clear that the object of Mr. and Mrs. Smyth, as between themselves and Wadham Pigott, would have been to have had the control of the fund themselves.

Secondly, if Wadham Pigott is not the person to whom the whole disposition is to be attributed, but J. H. Smyth and Ann his wife participated in the settlement, the defendants are liable to a rate of duty under the 13th section of the 16 & 17 Vict. c. 51, which enacts, that "where the successor shall derive his succession from more predecessors than one, and the proportional interest derived from each of them shall not be distinguishable, it shall be lawful for the Commissioners to agree with the successor as to the duty payable, but if no such agreement shall be made the successor shall be deemed to have derived his succession in equal proportions from each predecessor, and shall be chargeable with duty accordingly. *In Re Jenkinson* (a) may be referred to on the other side, but the facts were not similar to those in the present case. There a tenant in tail, the nephew of the tenant for life in possession, in consideration of an immediate annuity of 2,250*l.* joined in appointing the estates, after the death of the tenant for life, to trustees for a term of 3000 years in trust, to raise a sum of 20,000*l.* for the three daughters of the tenant for life and their husbands. The tenant for life, as between him and the tenant in tail, paid the full price for the term; and, therefore, the Court held that the settlement emanated from the tenant for life. That case might apply if it were shewn that Mrs. Smyth had paid a full equivalent for the transfer of the stock, and that Wadham Pigott parted with all control over the fund. Here, however, he had such a control as would have enabled him to ask for the interposi-

1859.

  
ATTORNEY  
GENERAL
v.  
BAKER.

(a) 24 Beav 64.

1859.  
 ATTORNEY  
 GENERAL  
 v.  
 BAKER.

tion of a Court of equity, if the trustees had misappropriated the fund.

*Bovill* (with whom were *Unthank* and *Henry Thring*), for the defendants.—Under the supposed state of things *Wadham Pigott* would have had no right to file a bill. After the money came into the hands of the trustees, the only persons who would have had any remedy against them would have been the parties beneficially interested. The transaction here, as in *In Re Jenkinson (a)*, amounted to an actual purchase of the fund by Mrs. Smyth. The deed of release, which was executed before the trust deed, recites “that the sum of 30,000*l.* Bank Annuities had been directed to be transferred by *Wadham Pigott* into the names of the trustees.” *Wadham Pigott* could not direct himself. The meaning therefore is, that Mr. and Mrs. Smyth directed the transfer. There being a doubt as to whether Mrs. Smyth was legitimate, the parties determined not to litigate the question. *Wadham Pigott* got a release from which he derived a benefit. Though the personal estate of *John Pigott* exceeded 60,000*l.*, Mrs. Smyth agreed to accept 30,000*l.*, she and her husband giving a release. The ultimate trust of the deed is in favour of Mr. and Mrs. Smyth. All these considerations shew that Mr. and Mrs. Smyth claimed the money as their own, and were the parties really disposing of the fund. Assuming the contention on the part of the Crown to be well founded, if the ultimate trust in favour of the survivor of Mr. and Mrs. Smyth had taken effect such survivor might have been compellable to pay 10*l.* per cent. succession duty, though they had given full consideration for the property. As to the claim for duty under s. 13, there is no pretence for saying that *Wadham Pigott* and Mrs. Smyth were joint settlors. [*Martin, B.*—

(a) 24 Beav. 64.

If it is doubtful to which of two persons a sum of money belongs, and they join in putting it into settlement, they are joint settlors. If I am at liberty to form a conjecture I should say that such was probably the case here.] The Court is not at liberty to draw such an inference of fact upon the special verdict. It is for the Crown to establish a claim to the duty, and it cannot be shewn that Wadham Pigott was the settlor either wholly or in part. Therefore the defendants are entitled to judgment.

1859.

  
 ATTORNEY  
 GENERAL

 v.  
 BAKER.

*The Solicitor General*, in reply.—It is not necessary to contend that the transaction amounted to a gift of the 30,000*l.* by Wadham Pigott. Wadham Pigott may have been the settlor notwithstanding that the release was a valuable consideration. This is not a purchase of the 30,000*l.* Suppose an estate is sold and conveyed in trust for the family of the vendee; there the vendee would be the settlor, because the vendor is bound to convey the estate according to the purchaser's directions. Here, Mrs. Smyth could not have said "pay the money or half of it to me, or convey it to trustees other than those who are the trustees of this settlement." [*Pollock*, C. B.—If Wadham Pigott of his own will settled this money in a particular way, the Crown is entitled to the duty claimed. If Mrs. Smyth by virtue of her right to and ownership of the money, to which Mr. Pigott attorned, directed the settlement, then the duty is not payable.] Suppose a person sells an estate to another on condition that the estate shall be settled in a particular way, the vendor is a joint settlor. That is what was done here. [*Pollock*, C. B.—It does not appear that the settlement emanated from Wadham Pigott, or was made a condition precedent, so as to make him a settlor.] The Court cannot surmise that any other proposal would have

1859.  
ATTORNEY  
GENERAL  
v.  
BAKER.

been accepted. It is not inconsistent with the suggestion that Wadham Pigott was the settlor, that after having secured the provision he wished to make for the children, he was willing to permit an ultimate trust for Ann Smyth and her husband. The 13th section does not apply to those cases only where the settlors have a joint interest, but to every case where the successor derives his interest from more predecessors than one.

POLLOCK, C. B.—We are all of opinion that the Crown is not entitled to the duty of 10*l.* per cent. Two claims were made on behalf of the Crown, one of 10*l.* per cent., considering Wadham Pigott as the predecessor, the other to a rate of duty considering him as a joint predecessor with Mrs. Smyth. The Crown is not entitled to consider this as a case where there were two predecessors. I think that in order to establish the latter rate of duty it should have been shewn that, it being doubtful which of the two was entitled to property, both concurred in settling it. Here it is clear that either one or the other was the settlor. Under such circumstances the act does not require the Court to pronounce that there is a joint settlement. The Crown is entitled either to 1*l.* per cent. or to 10*l.* per cent. As to 10*l.* per cent., the special verdict leaves the matter in doubt; and it is impossible for any one, with the degree of confidence necessary in such a case, to say that Wadham Pigott was the settlor. The parts of the deed referred to by the *Solicitor General* do not shew that an arrangement was made with Wadham Pigott in which it was stipulated by him that this particular settlement should be made. If it were so I am not sure that it would have been enough. The deed proceeded on a claim of right on Mrs. Smyth's part. The arrangement embodied in the deed was one of

which she was the head, and not Wadham Pigott. If I were called upon to decide the question, I should say that Mrs. Smyth was the settlor.

1859.

ATTORNEY  
GENERAL

v.  
BAKER.

MARTIN, B.—I am of the same opinion. To entitle the Crown to succeed it must be shewn that Wadham Pigott was the predecessor within section 2, or a joint predecessor within section 13. It is incumbent upon the Crown to establish the affirmative; but the Crown has failed to do so. The case depends on the special verdict. I am not aware that it is the duty of the Court to draw inferences as to the state of things which led to the execution of the deeds, but only to put a construction on the words of the deeds themselves. Now upon these no one can say that it appears that Wadham Pigott was the predecessor either solely or jointly with Mr. and Mrs. Smyth. He may have been the sole predecessor if, of his own free will, he made the settlement knowing that Mrs. Smyth was illegitimate. But it may be that, knowing or believing that she was legitimate but could not prove her claim, he made a bargain that he would execute the settlement on having a release. This is quite as likely as that Wadham Pigott was the predecessor. I believe that in a special verdict the Court has no power to draw inferences of fact.

WATSON, B.—From the commencement of the case I never doubted but that J. H. Smyth and Ann Smyth were the predecessors, and not Wadham Pigott. First, there is a release of claims. Then there is the settlement, by which it appears that, in order to obviate any differences touching any rights which Ann Smyth had, Wadham Pigott had proposed and agreed, upon having a release from Mr. and Mrs. Smyth, to transfer 30,000*l.*, to be settled upon trusts for the benefit of Mr. and Mrs. Smyth and their children.

1859.  
ATTORNEY  
GENERAL  
v.  
BAKER.

Therefore there is a claim and a compromise of that claim, and a release executed in pursuance of the compromise. There is nothing to shew that the settlement emanated from Wadham Pigott. There was a valuable consideration for it. The transfer does not appear to have been to trustees appointed by Wadham Pigott, but on behalf of Mr. and Mrs. Smyth and for the benefit of their family. The interest of the money is given to Mr. Smyth for life, then to his wife for life, and then to their children. The effect of the compromise was that the money belonged to the husband and wife, and they were the settlors. The trustees were their trustees, and their family are the only persons interested under the settlement. All that Wadham Pigott appears to have cared for was the release. Then it was contended that the parties might be joint settlors with Wadham Pigott. Section 13 provides for a case "where the successor shall derive his interest from more predecessors than one, and the proportional interest derived from each of them shall not be distinguishable. That applies where two persons who settle property have an interest, but it cannot be determined how much each has. Here, until the execution of the release, Mr. and Mrs. Smyth had no interest; but, upon such execution, the money became theirs.

CHANNELL, B.—I confess that on some points I entertain considerable doubt. I cannot entirely concur in the view taken by the other members of the Court, though I am not prepared to dissent from their decision. The Crown asks for judgment on a special verdict. If the facts stated are not sufficient to make out the title of the Crown, the defendants are entitled to judgment. I am not satisfied that the Crown has made out that Wadham Pigott was either the sole or a joint predecessor. There was a good con-

sideration for the bargain ; but I agree with the *Solicitor General* in thinking that a good consideration will not prevent this from being a settlement. The claim may have been one either wholly unfounded, or the establishment of which would have been attended with considerable difficulty. Wadham Pigott may have said : “ Connected as you are with me by blood, I will enter into an arrangement to settle the property upon these terms, so as to secure an interest to your children.” Mr. and Mrs. Smyth may have come forward and become parties to this arrangement, consenting to take life interests instead of getting the money absolutely for their own use. I cannot say what was the true state of things. The doubt I feel is whether if the question depends upon the deeds, the Court may not be bound to determine it, however difficult of solution it may be.

1859.  
 ATTORNEY  
 GENERAL  
 v.  
 BAKER.

Judgment for the defendant.

GARTON and Another v. THE BRISTOL AND EXETER  
 RAILWAY COMPANY.

Jan. 26.

THIS action came on for trial before *Crowder, J.*, at the Bristol Spring Assizes 1858, when by consent a verdict was

By the Gt. Wm.  
 4, c. xxxvi., a  
 Company was  
 incorporated

for the purpose of making a railway from Bristol to Exeter. By section 178, the Company was authorized to make such reasonable charges for the conveyance of passengers and goods on their railway as they might determine upon, not exceeding a certain sum. The 8 & 9 Vict. c. clv. empowered the Company to make a junction railway and three branch railways. The 19th section provided, that it should not be lawful for the Company to charge in respect of certain goods “conveyed on *the railway*” more than certain sums therein specified. The Company published a table of their charges for the carriage of goods. It contained an alphabetical list of various goods, divided into five classes, and “packed parcels” were to be charged of the fifth class, with 50 per cent. added to the rate. The plaintiff, a carrier, sent a “packed parcel” to be carried by the Company on their railway from Bristol to Bridgewater. This parcel contained, amongst other things, a cask of spirits, but it did not appear that any appreciable extra risk was thereby occasioned. The Company charged for the carriage of this parcel according to the rate of the fifth class with 50 per cent. added to it. Persons, not carriers, were accustomed to send packed parcels without the additional charge of 50 per cent.

*Held* : First, that the words “the railway,” in the 19th section of the 8 & 9 Vict. c. clv., applied to the whole line of railway, and not to the junction and branch railways only.

Secondly, that the charge to carriers of 50 per cent. in addition to the rate for “packed parcels,” was an unequal and unreasonable charge.


1859.  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY Co.

entered for the plaintiffs, damages 5*l.*; and it was referred to an arbitrator to state a special case for the opinion of this Court, which was as follows:—

The declaration is for money received by the defendants for the use of the plaintiffs. Plea: “Never indebted;” and the action is brought to recover back money paid under compulsion by the plaintiffs to the defendants under the following circumstances.

The plaintiffs are common carriers at Bristol, having an agent at Bridgewater, and also having agents at other principal towns and places at or near which the defendants have stations, on the line of their railway. The defendants are the owners and occupiers of the Bristol and Exeter Railway, and are incorporated by the 6 Wm. 4, c. xxxvi.; and under the authority and provisions of that and their subsequent Acts, the defendants carry goods for the public on their railway as common carriers or otherwise. (The case referred to the 175th, 177th and 178th sections of the 6 Wm. 4, c. xxxvi., the 28th and 29th sections of the 3 Vict. c. xlvii., and the 19th section of the 8 & 9 Vict. c. clv.). The defendants regulate their charges for the carriage of goods upon their railway by two tables published by them, the one called “The Classification of Goods” or “Scale Bill,” the other “The Local Goods and Cattle Rates Bill.” The first of these tables was published by the Company on the 5th of November, 1855, and has been acted upon by them ever since. It contains an alphabetical list of various goods, and refers each of the goods so named to a particular class, the number of such classes being five. By this table it will be found that for certain specified articles a given per centage, in addition to the rate of charge for the classes to which they are respectively referred, is to be paid; and “Packed Parcels” are to be charged of the “Fifth Class,” with 50 per cent. to be added to the rate. It is further stated,

at the foot of the said list, that all goods not specified in the list will be charged in the Fifth Class; and that all goods and packages, the contents of which are not properly declared by the senders, will be charged in the highest (that is, as appears by the Local Goods and Cattle Rates Bill, the Fifth) Class.

1859.  
  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY CO.

In the other list, "The Local Goods and Cattle Rates Bill," which was published by the defendants on the 1st of January, 1855, and which is still in force, will be found the rate, per ton, charged by the Company for the carriage of the several classes of goods between Bristol, and several stations, on their line, mentioned in the said list, Bridgewater being one of such stations.

As a general rule, the several rates to be paid, under the same circumstances, for the different classes, vary in an ascending scale, the lowest charge being for the first class, and the highest for the fifth class; but in some few instances the rates of charge, under the same circumstances, in respect of some two or more of the classes are the same.

The respective rates, per ton, in respect of the carriage of goods between Bristol and Bridgewater, are as follows:— For the first class, 6*s.* 8*d.*; the second class, 8*s.* 4*d.*; the third class, 12*s.* 6*d.*; the fourth class, 16*s.* 8*d.*, and the fifth class, 16*s.* 8*d.* It further appears, by the same tables, as the fact is, that the tonnage rates do not come into operation until the consignments exceed 500 pounds in weight.

On the 20th January, 1858, the clerk of the plaintiffs delivered to the defendants at their station at Bristol a parcel declared and described as "One Bale of Drapery," and being of the weight of 7 cwt. 1 qr., to be carried by the defendants for the plaintiffs from Bristol to Bridgewater. The clerk of the defendants demanded for the carriage of the parcel, including the loading and unloading thereof, the sum of 6*s.* 1*d.* which the clerk of the plaintiffs paid under

1859.  
GARTON  
v.  
BRISTOL  
AND  
EXETER  
RAILWAY Co.

protest, and the goods were thereupon carried by the defendants, for the plaintiffs, on their railway, from Bristol to Bridgewater. On the following day, the 21st January, the clerk of the plaintiffs delivered to the defendants a hamper, to be carried by them for the plaintiffs from Bristol to Bridgewater. The hamper weighed 5 cwt. 3 qrs. 6 lbs., and was described and declared in the forwarding note, which the plaintiffs, in compliance with the regulations of the Company, caused to be delivered to them at the time of the delivery of the hamper, as "One Hamper of Manufactured Goods." The clerk of the Company inquired the contents of the parcel. The clerk of the plaintiffs replied that it was a "packed parcel," and the defendants thereupon wrote upon the forwarding note, under the words "manufactured goods," "packed parcel," and charged for the conveyance thereof 7s. 6d., being at the rate of the charge for goods of the Fifth Class, that is to say, 16s. 8d. per ton for the whole distance, with 50 per cent. added to the said rate. The clerk of the plaintiffs paid the said sum of 7s. 6d. under protest. The defendants' clerk gave him the usual receipt, and the goods were thereupon conveyed by the defendants for the plaintiffs on their said railway from Bristol to Bridgewater, to be delivered there to the agent of the plaintiffs, to whose care the same were consigned.

The plaintiffs and their clerk understood by a "packed parcel" a parcel consisting of separate and distinct parcels (without reference to the nature or description of their contents) collected from more than one original consignor, or directed to and destined for more than one ultimate consignee, but packed and made up into a single and entire parcel to be forwarded to the consignee of such single and entire parcel, and dealt with by him according to its contents, and this is what is generally and ordinarily understood by a "packed parcel." The defendants admit

that they considered such parcels to be packed parcels before the decision of the Court of Common Pleas in the case of *Parker v. The Great Western Railway Company* (a); but they also intend and understand by a "packed parcel" a parcel consisting of separate and distinct packages of goods, not being of similar nature and description, packed and made up into a single and entire parcel; and that every such parcel is a "packed parcel," without any reference to the number of the original consignors or consignees of the enclosed packages; and since the last named decision they have treated and considered such last named parcels, and those only, as "packed parcels" liable to be charged as such under their existing scale list, but they have never given any public notice of this or taken any general steps to make it known to the public.

The contents of the parcel so delivered by the plaintiffs to the defendants on the 21st January were not communicated to the defendants; and if they had been the defendants would not have taken any notice of such communication. But the parcel in question, as is ordinarily the case with carriers' parcels consisting of packed inclosures, did in fact answer both definitions of a "packed parcel,"—it consisted of seven separate and distinct packages collected by the plaintiffs in the course of their business as common carriers from seven separate consignees, and directed to and intended for ultimate delivery by the plaintiffs' agent to seven separate consignees; and these several packages were made up and packed together into a single and entire parcel. The nature and description of the goods contained in these separate packages respectively were not the same for each of such packages, but one package contained goods of one nature and description, another contained goods of a different nature and description.—(The case then set out the nature

(a) 11 C. B. 545.

1859.  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY CO.

1859.  
GARTON  
v.  
BRISTOL  
AND  
EXETER  
RAILWAY Co.

and weights of the several inclosed packages. They consisted of drapery, tobacco, paper, haberdashery, and *one cask of spirits*).—The highest class to which any of these articles belong is the fourth.

Persons in trade, not carriers, have for many years been in the constant habit of sending to their customers by the defendants' railway parcels of separate and distinct packages made up into single parcels; and in many of these cases the nature and description of the goods contained in some of such packages have been different from the nature and description of the goods contained in other packages inclosed in same parcels respectively. In many of such cases also, several of such inclosed packages respectively have been directed to and intended for other customers or persons than the consignees of such parcels respectively residing in or near towns or places to which such parcels were being sent; and in many instances during that time several tradesmen desirous of sending their respective goods, being of different natures and descriptions, to a common customer, have sent their respective packages to one of their number to be packed and made up by him into a single and entire parcel and forwarded to their said customer by the defendants' railway, which has been done accordingly. Parcels of all these descriptions so sent by persons in trade, not being carriers, have been repeatedly carried by the defendants on their railway between Bristol and Bridgewater.

In cases where the nature of the contents of these parcels has not been declared so as to enable the defendants to refer them to any particular class, the sums charged and paid for the carriage of such parcels have been after the rate chargeable for the fifth class and no more, except in the case of the annoyed consignee hereinafter mentioned. The general existence of this practice has been known to the defendants.

There is no risk incurred by the defendants in the carriage of a parcel by reason of its consisting of several inclosures from different consignors or for different consignees. But the average risk incurred by the defendants from the carriage of a parcel consisting of inclosed packages of different natures and descriptions, is greater than the average risk incurred by them from the carriage of a parcel consisting of articles all of the same nature and description. This extra risk is chiefly, if not altogether, caused by the frequent presence of liquids in such parcels, the ignorance of the defendants of the presence of such liquids, the inability of the defendants to ascertain whether they are sufficiently and safely packed, the chance of their being insufficiently and unsafely packed, and, as a consequence, the risk of the liquids leaking through such parcels and doing damage to the goods contained in the said parcels. The extent of such extra risk has not been proved, nor is there any satisfactory proof that a charge upon all such parcels, at the rates chargeable for articles of the fifth class, would not be sufficient to indemnify the defendants against such extra risk.

As a general rule it is, practically speaking, impossible for the defendants to recognise in any individual instance a "packed parcel" in either sense of the word; and the instructions given by the defendants to their clerks are, that they are not to make any inquiries of the consignor for the purpose of ascertaining whether any individual parcel is or is not a "packed parcel;" but if the nature and individual appearance of any particular parcel is such as to raise a conviction in the mind of the clerk that it is a "packed parcel," in the sense attributed to that term by the defendants, he is to charge it as a packed parcel unless the sender proves to his satisfaction that it is not a "packed parcel."

The practical result of the system adopted by the de-

1859.  
  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY Co.

1859.  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY CO.

fendants has been that they have never charged, or, so far as appears by the evidence, sought or attempted to charge, any parcel sent by one of the public, not being a carrier, as a "packed parcel," with one exception; and then no steps had been taken by the defendants to charge the parcel as a "packed parcel;" and the same had been charged and delivered to the consignee thereof as an ordinary parcel, but the consignee being annoyed with the trouble of delivering the several inclosures to the persons for whom they were intended voluntarily went and told the defendants and complained to them of the annoyance to which he was subjected; and then the defendants said, "Give us back your parcel and we will charge you 'Fifth Class,' with 50 per cent. in addition, which they did accordingly;" and the consignee paid them their extra charge as for a packed parcel, and except, as aforesaid, in every case where a parcel has been charged as a packed parcel, such parcel has been a carrier's parcel.

The whole of the railway between Bristol and Bridgewater is on the main line of the Company's railway; and no part of the railway over which the parcels in question were carried forms any part of the junction railway, or of either of the branch railways authorized to be made by the statute 8 & 9 Vict. c. clv. The distance between Bristol and Bridgewater, over which the said parcels were carried, is 33 miles, and the sum charged for the carriage of the first-named parcel exceeds the maximum sum authorized to be charged for the carriage of such a parcel (after deducting a reasonable sum for the expense of loading and unloading) by the 19th section of the last-named Act by the sum of 1s. 4d.; and the sum charged for the carriage of the packed parcel in like manner exceeds the maximum sum authorized to be charged by that Act by the sum of 3s. 6d.

The questions for the opinion of the Court are: First, whether the 19th section of the 8 & 9 Vict. c. clv. applies to the carriage of goods by the defendants on their railway between Bristol and Bridgewater.

Secondly, whether, assuming that section not to apply to such a case, the defendants were, under all the circumstances, justified in charging for the carriage of the second parcel the said sum of 7*s.* 6*d.*, or any and what further sum than the sum of 5*s.*, the proper sum chargeable for the said parcel regarded simply as a parcel of the fifth class.

If the Court should be of opinion that the 19th section of the last mentioned statute does not apply to the carriage of goods under the circumstances mentioned, the verdict is to stand for the plaintiffs, but the amount is to be reduced to 4*s.* 8*d.* If the Court should be of a contrary opinion, and should be of opinion that the defendants, under the circumstances, were nevertheless not justified in charging for the carriage of the second parcel the said sum of 7*s.* 6*d.*, the verdict is to stand for the plaintiffs, but the amount is to be reduced to the sum of 2*s.* 6*d.* If the Court should be of opinion that the last mentioned statute does not apply to this case, or that the defendants were, under the circumstances, justified in charging for the carriage of the second parcel the said sum of 7*s.* 6*d.*, the verdict for the plaintiffs is to be set aside and a verdict entered for the defendants.

*Collier*, for the plaintiffs.—The case raises two points: first, whether the defendants are prohibited by the 8 & 9 Vict. c. clv. from making these charges; and if not, secondly, whether the charge to carriers, of 50 per cent. in addition to the rate is an unequal charge, and whether it is an unreasonable charge if all persons were charged

1859.

GARTON

BRISTOL

AND

EXETER

RAILWAY Co.

1859.  
  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY CO.

alike. The 8 & 9 Vict. c. clv. authorized the Bristol and Exeter Railway Company to make a junction railway and certain branch railways, one of the latter commencing by a junction with the Bristol and Exeter Railway, in the parish of North Petherton, and terminating in the parish of Yeovil. Section 19 enacts. "That it shall not be lawful for the Company to charge in respect of the several articles, matters and things thereafter mentioned, conveyed on *the railway*, any greater sum, including the charges for the use of carriages," &c. "than the sums thereafter mentioned." The defendants contend that the words "the railway" mean the junction and branch railways authorized by that Act to be made. The plaintiffs contend that it applies to all the Company's railways. The Company was incorporated by the 6 Wm. 4, c. xxxvi. The 175th section regulates the rate of tonnage to be taken by the Company for the use of the said railway. By the 178th section the Company are authorized to provide locomotive engines and in carriages or waggons drawn or propelled thereby to convey upon "the said railway," and also along and upon any other railway communicating therewith, all such passengers, cattle and other animals, goods, wares, and merchandize as shall be offered to them for that purpose, and to make such *reasonable charges* for such conveyance as they may from time to time determine upon, in addition to the several rates or tolls by this Act authorized to be taken." Therefore, if the question depended on that Act, it would merely be whether the charges were reasonable. The 3 Vict. c. xlvii. recites, that it is expedient that some of the powers and provisions of the 6 Wm. 4. c. xxxvi., and the 1 Vict. c. xxvi. should be altered, amended, and enlarged. The 28th section repeals the 30th section of the 1 Vict. c. xxvi., which provided that the rates, tolls and charges for the use of the railway, should at all times

be charged equally to all persons, and after the same rate "throughout the whole of *the said railway*." In like manner the 8 & 9 Vict. c. clv., s. 19, uses the expression "conveyed on the railway," which is applicable both to the main line and the branches. That Act recites all the previous Acts: also that it is expedient that the capital authorized to be raised by these Acts should be increased, and that some of their powers and provisions should be amended and enlarged; and it incorporates the "Lands Clauses Consolidation Act, 1845," and certain parts of the "Railway Clauses Consolidation Act, 1845." By section 2, all the provisions, matters and things contained in the recited Acts are made applicable to that Act. Then follow a specific class of provisions relating to the junction railway and branch railways: ss. 3, 4, &c. The 17th section enacts, "that the junction railway and branch railways shall be completed within five years from the passing of that Act." The terms "junction railway" and "branch railways" are then dropped, and the 18th section enacts, "that it shall not be lawful for the Company to demand any greater sum in respect of the carriage of passengers conveyed on *the railway* than 3*d.* per passenger per mile," &c., "Provided always, that if any such passenger be conveyed for a less distance than six miles, it shall be lawful for the Company to demand and receive tolls as for six miles." Section 19, which also uses the terms "conveyed on the railway," applies to the whole railway. Section 20 enacts, "that every passenger travelling upon the railway may take with him his ordinary luggage, not exceeding one hundred pounds in weight," &c. In section 23, which enables the Company to create new shares, the legislature reverts to the terms "junction railway," and "branch railways." The legislature having used the terms "the railway," "junction railway," and "branch railway," when


1859.  
  
 GARTON  
 &  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY CO.

1859.  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY CO.

they speak of "the railway" only, they mean the whole line. There are other provisions which are clearly applicable to the whole railway, such as the power to borrow money on mortgage: sect. 30. In the 48th section the legislature refers to the "said railway, junction railway, and branch railways" as separate and distinct things. Some light is thrown on the subject by the 9 & 10 Vict. c. clxxxi., "for making a railway from the Yeovil branch of the Bristol and Exeter Railway to or towards the town of Crewkerne, in the county of Somerset, and for amending the Acts relating to the Bristol and Exeter Railway." In that Act, when the legislature meant the branch railway, it is so expressed. The 8th section enacts that, "the said branch railway" shall be completed within five years. Section 9 limits the charge for conveyance of passengers "on the branch railway;" and whereas, by the 8 & 9 Vict. c. clv., s. 18, the Company are authorized to charge for six miles where a passenger is conveyed less than that distance, by the 9 & 10 Vict. c. clxxxi., s. 9, the Company are only to charge on the branch railway for four miles where a passenger is conveyed a less distance than four miles. That alteration shews that in the previous Act the legislature did not mean the branch railways only, but the whole line. Section 10, which limits the charge for the conveyance of goods, uses the words, "on the railway," which there means the railway mentioned in the previous section, viz., the branch railway.

Secondly, assuming that the 19th section of the 8 & 9 Vict. c. clv. does not apply to the carriage of goods on the main line, the question is, whether the charge of 50 per cent., in addition to the usual rate, is an unequal or an unreasonable charge. [*Martin, B.*—The question of inequality is a matter of fact.] The case finds that the defendants never charge any parcel sent by persons, not

carriers, as “a packed parcel.” It also finds that carriers are asked whether the parcel is a packed parcel, but no question is asked of other persons. *Crouch v. The Great Northern Railway Company* (a), *Parker v. The Great Western Railway Company* (b), are authorities that the defendants are not justified in charging an additional rate for packages containing parcels belonging to different persons. *Edwards v. The Great Western Railway Company* (c) expressly decided, that a railway company cannot lawfully charge a carrier a rate larger than that charged to the rest of the public. But, assuming that the defendants charged all persons alike, the charge is unreasonable. Though the case finds that there may be some extra risk from the parcel containing liquids, yet the extent of such extra risk was not proved.

1859.  
  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY Co.

*Butt* (with whom were *Kinglake*, Serjt., and *Montague Smith*), for the defendants.—The 19th section of the 8 & 9 Vict. c. clv. applies only to the junction and branch railways authorized to be made by that Act, the main line remains under the provisions of the original Act, 6 Wm. 4, c. xxxvi. That construction is recognised in the 15 Vict. c. ix., (the Act “to extend the powers of the Act relating to the Yeovil branch of the Bristol and Exeter Railway, and to authorize a deviation in the line of such branch railway”), by the 17th section of which the Company may make the same charges in respect of the new or substituted line. The 3rd section of the 8 & 9 Vict. c. clv. empowers the Company to make a junction railway and three branch railways, according to certain plans. The 6th section commences, “whereas *the railway* is intended to be carried

(a) 11 Exch. 742.

(b) 11 C. B. 545.

(c) 11 C. B. 588.

1859.  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY CO.

over the navigable river Parrett," &c., clearly meaning the junction railway and branch railways. In like manner the 7th, 8th, 9th, 10th, 12th, and 15th sections use the term "the railway." [*Martin, B.*—The legislature is speaking of the railway on certain defined localities.] In the 17th section the expression is changed, and the terms "junction railway and branch railways" are again made use of. The 18th, 19th and 20th sections revert to the term "the railway." The 23rd section has the words "junction railway and branch railways." In the 46th section, which relates to the main line, the words are "the railway by the 6 & 7 Wm. 4, c. xxxvi. authorized." Again, the 48th and 49th sections speak of "the said railway, junction railway, and branch railways." Therefore, when it is intended that the term "the railway" should apply to the main line it is so expressed. If the 19th section be construed as contended for by the plaintiffs, it would repeal the 178th section of the 6 Wm. 4, c. xxxvi. The branch railway authorized to be made by the 9 & 10 Vict. c. clxxxi. has never been made, and the time limited by the Act for making it has expired.

Then with respect to the alleged inequality of charge, there is nothing in the case to shew that the defendants dealt unequally with the public. Moreover, the charges were not unreasonable. The defendants were entitled to charge for the extra risk occasioned by spirits being packed with drapery. In *Piddington v. The South Eastern Railway Company* (a), it was left to the jury to say whether there was increased risk in the carriage of packed parcels. *Crouch v. The Great Northern Railway Company* (b) left this question untouched. If a carrier packs in one parcel a variety of goods, some of which are of such a nature that


(a) 27 L. J., C. P. 295.

(b) 11 Exch. 742.

they are likely to injure the others, it is reasonable that the Company should make an extra charge for the extra risk which they incur.

*Collier* was not called upon to reply.

POLLOCK, C. B.—I am of opinion that the plaintiffs are entitled to judgment. Certainly these Acts are not drawn with that precision or correctness which is desirable, and the term “the railway” sometimes means the junction and branch railways, sometimes the entire railway. We are to decide what is meant by “the railway” in the 19th section of the 8 & 9 Vict. c. clv. It would not be a bad plan, in construing these Acts, to consider the circumstances under which they are passed. The Company prepare a bill relating to their particular object; the legislature says it shall not be lawful for you to charge more than a certain sum for conveyance on your railway. You are the proprietor of a certain railway; and though you split that railway into a junction, branches and main line, still you shall not charge above a certain rate for conveyance on that railway. ‘The junction and branch railways are not aptly described as “the railway.”’ If that expression applied to them alone, on a portion of the line, for instance from Bristol to Yeovil, there would be a charge for one part of the distance at one rate, and for another part at another rate. No doubt the clause was put in the Act by those who intended to introduce a general restraint, though it is couched in language not calculated to effect that object. This being the Act of the Company, if the intention was that they should be at liberty to charge more for the carriage of goods on one part of their line than on another, it was for them to make that clear, by saying that it should not be lawful for them to charge more than a certain sum on the junction railway and branch railways. The language will apply to the whole railway, and if that construction in some instances fails

1859.  
  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY Co.

1559.  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY CO.

to effectuate the intention of the framers of the Act, it is the fault of the Company who ought to have made it plain. The interpretation clause (sect. 47), which says that the singular shall include the plural, does not apply; if the expression had been "upon the railways," the question would have been the same. It seems to me that we are bound to construe this clause as applicable to the whole railway, and not to the junction and branch railways only. It is a clause in reference to which the public have certain rights, and, as between the Company and the public, if the clause will apply to the whole line we ought to put that construction upon it; for if the Company meant to restrain it to a particular part of the railway, they should have done so in plain words. We are called upon to construe the clause so as to make it sensible. Upon these grounds, it appears to me that the 19th section of the 8 & 9 Vict. c. clv. does apply to the railway between Bristol and Exeter as well as to the junction and branch railways.

As to the other questions, since they may arise again, it may be convenient to give an opinion upon them. I think that the defendants were not entitled to charge more than 5s. for the carriage of the parcel. The risk was inappreciable, and the charge of 50 per cent. in addition to the rate was unreasonable. Therefore, upon the whole of the case, our judgment must be for the plaintiffs.

MARTIN, B.—I am of the same opinion. I do not see how we can construe the 18th and 19th sections of the 8 & 9 Vict. c. clv., in the manner required by the defendants. The Act is the Act of the Company, prepared by their legal advisers, and in which it may be reasonably required that they should have inserted words so as to preclude all mistake. (His Lordship read the 18th and 19th sections). The Act was passed to amend the Acts relating to the Bristol and Exeter railway, and to authorize the formation of a junction rail-

way, and several branch railways connected with the same. One of those branch railways goes to Yeovil, and if the defendants' view is correct a passenger travelling from Bristol to Yeovil would be charged less upon one part of the line than upon the other part of the line, so that he would pay two different rates for different parts of his journey. That seems to me absurd. However, the ground of my opinion is, that considering the ambiguity of the Act, we are entitled to call upon the Company to clear it up. It may be that a limitation of the charges on all the lines was made by the legislature as the condition upon which they would grant powers to make the junction and branch lines.

With respect to the other point two objections were made: first, that the charges were not equal. If a carrier brings a parcel, a presumption is made against him; but it is perfectly plain that other persons are in the habit of sending the same kind of parcels, and no question is asked. Then how can the charge be equal when one person is uniformly charged at a particular rate, 50 per cent. less than a carrier is charged? No doubt there is extra risk in some packed parcels, and for which the Company would have a right to charge extra; for instance, if soda water, one of the articles mentioned in the Rate Bill, was packed with silk, which is another article, it is not improbable that the silk might be injured and the Company would be responsible; therefore it is reasonable that in some cases an extra charge should be made. As a general rule, I am disposed to lay down, that no extra charge should be made for packed parcels, though for such as contain liquids some extra charge would not be unreasonable; but it is certainly unreasonable to make different charges to different persons for the same packed parcels.

WATSON, B.—I am also of opinion that the plaintiffs are

1859.  
 ~~~~~  
 GARRIS  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY CO.

entitled to judgment. The first question is, as to the meaning of the 19th section of the 5 & 9 Vict. c. clv. I am of opinion that, upon the true construction of the clause, it extends not only to the junction and branch railways but also to the main railway. I will not construe the enactment by the particular expression "the railway;" but look at the general character of the Act and see what the intention of the legislature was. The Act is to amend the Acts relating to the Bristol and Exeter Railway, and to authorize the formation of a junction railway and branch railways. It recites that the making of a junction railway and three branch railways would be of great public advantage, and that it is expedient that the capital of the Company should be increased, and that some of the powers and provisions of their Acts should be amended and enlarged. So that the object of the Act was not that these should be separate railways, but that all the railways of the Company should be as one railway and under one capital. Then is the 19th clause consistent with the provisions of the former Act, 6 Wm. 4. c. xxxvi.? The 17th section of that Act says that the Company may make such *reasonable charges* as they may from time to time determine upon. The 18th section of the 5 & 9 Vict. c. clv., which applies to passengers, limits the charge for their conveyance to a certain sum: but if any passenger is conveyed for a less distance than six miles, the Company may charge for six miles. Suppose a person goes from Yeovil to Exeter, is he to be charged separately for each part of the railway? Or suppose a person about to travel a less distance than six miles, starts from the branch line and proceeds on the main line, is he to be charged as for six miles, or only the distance he travels? I am therefore of opinion that the 18th section applies to the whole line of railway. Then the 19th section says that the Company shall only

charge a certain sum for goods conveyed "on the railway:" that is perfectly general, and applies to the whole line of railway. It appears to me that if we look to the object of the Act, it is not an Act conferring a power to charge, but creating a limitation of charge, and that it does not treat this Company as several Companies with separate lines of railway, but as one Company having one line of railway. I think that the 19th section applies not only to the junction railway and branch railways but also to the main railway.

1859.  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY Co.

Then as to the other points.—It appears that not only carriers but other persons not in that trade have been in the habit of sending packed parcels by this railway; and there is no doubt the Company deal unequally as regards carriers and such persons. A carrier is asked whether the parcel is a packed parcel, but that is not so in the case of persons not in the trade. Therefore the dealing is unequal in that respect. Then as to the inequality in charge, a carrier is charged for a packed parcel 50 per cent. more than other persons. It is said that there is extra risk in carrying a packed parcel, but the arbitrator has found that such extra risk was not proved. It may be that there is some extra risk, but it is inappreciable. For these reasons I am of opinion that the 19th section of the 8 & 9 Vict. c. clv. applies to the main railway, junction and branch railways, and that the charge to the plaintiffs was unequal and unreasonable.

CHANNELL, B.—I am also of opinion that the plaintiffs are entitled to judgment. The first question for our consideration is, whether the defendants are not bound to limit their charge with reference to the provisions of the 19th section of the 8 & 9 Vict. c. clv. It is conceded that if the defendants are bound to regulate their charge

1859.  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY CO.

by that enactment, there has been an overcharge. I am of opinion that they are bound to do so. Before the 8 & 9 Vict. c. clv. passed, this Company was incorporated for the purpose of making a railway, called the Bristol and Exeter Railway. On the 31st July, 1845, the 8 & 9 Vict. c. clv. passed, which provided for the formation of a junction railway and three branch railways. It is argued that the 19th section of that Act only regulates the charge in respect of the carriage of goods either on the junction or on the branch railways, and that it has no application to the carriage of goods along the main railway. I think that is not the proper construction of the Act. In the first place it contemplates an increased capital, and the junction and branch and main railways as belonging to one Company. It is argued that the language of the 19th section, which uses the words "the railway," cannot apply to any part but the original line. Those words, however, are more in favour of the plaintiffs' construction than the defendants': the clause would otherwise be insufficient to include the main line, junction, and branch railways.

Then as to the other points.—The first objection is, that however just the Company may have been in charging packed parcels at the rate of the fifth class, yet they are not justified in charging persons who are carriers 50 per cent. added to that rate. *Primâ facie* that is an unreasonable charge. The Company are bound to charge all persons equally, and are not entitled to raise the charge to carriers in respect of packed parcels. If the case stood there, it would be impossible to contend that this was not an unequal charge; but we are bound by the authority of decided cases, and this point has been already decided. It is said that it appears by the case that there was an increased risk. Then the question is, whether one package, containing spirits, being included in the parcel, may

... risk. I cannot see  
... was warranted. If  
... that must be got rid of  
... It is enough to say that  
... that fact, and it was for the  
... the arbitrator's finding is, in  
... may be some extra risk, it is

1859.  
GARTON  
v.  
BRISTOL  
AND  
EXETER  
RAILWAY Co.

Judgment for the plaintiffs.

PARKER v. INCE.

Jan. 17.

... stated that the defendant on, &c., by  
... covenanted with the plaintiff that he, the defend-  
... yearly, during the joint lives of the defendant  
... Catherine his wife, pay to the plaintiff as trustee for  
... said Catherine for her sole use an annuity of 200*l*.  
... quarterly payments.—Breach: non-payment of 50*l*. for  
one quarter.

By deed of  
separation  
between the  
defendant and  
his wife, the  
defendant  
covenanted  
with the plain-  
tiff, that he  
would every  
year during  
the joint lives  
of himself  
and his wife  
pay to the  
plaintiff, as a  
trustee for her,  
to her separate  
use, such sum  
as together  
with the  
dividends and  
interest or  
other income  
to arise from  
948*l*. 6*s*. 4*d*.  
Bank 3 per

Plea.—That before the commencement of the suit, the  
defendant became bankrupt within the true intent and  
meaning of the statutes in force concerning bankrupts,  
and that the alleged cause of action accrued before he  
became bankrupt.—Issue thereon.

By order of a Judge, the following case was stated for  
the opinion of this Court:—

cent. Annuities, or from other funds settled or which might be settled to her separate use and  
which might be received by her, would make one clear annuity or yearly sum of 200*l*., such  
annuity to commence from the 11th January, 1854, and to be paid by four even and equal  
quarterly payments: Provided, that if the defendant and his wife should at any time thereafter  
cohabit as man and wife, that then and from thenceforth the said annuity should cease. On  
the 29th September, 1854, and while the defendant and his wife continued to live separate, the  
defendant became bankrupt.—*Held*, that the annual sum, so covenanted to be paid by the  
defendant for the separate use of his wife, was not an “annuity” within the 175th section of the  
Bankrupt Law Consolidation Act, 1849, nor a “debt payable upon a contingency” within the  
177th section, or a “liability to pay money upon a contingency” within the 178th section; and  
consequently the certificate was no bar to an action for the recovery of a quarterly payment  
which became due after the bankruptcy.

1859.  
PARKER  
v.  
INCE.

This action is brought to recover 50*l.*, alleged to have become due from the defendant to the plaintiff, on the 11th of October, 1857, by virtue of a covenant contained in a deed dated 20th of March, 1854, and made between the defendant of the first part, his wife Catherine of the second part, and the plaintiff of the third part, and which deed was duly executed by the defendant in the year 1855; and by the other parties thereto in 1854, and on or about the day of its date.

The deed (so far as material) is as follows:—

“ This indenture made the 20th day of March, A.D. 1854, between John Ince, of, &c., of the first part, Catherine, the wife of the said John Ince, of the second part, and Wilmot Parker of the third part. Whereas differences have arisen and still subsist between John Ince and Catherine his wife, and by reason of the same they have agreed to live separate and apart from each other; and the said John Ince hath agreed to allow and pay the said Catherine such yearly sum as, together with the interest to arise from funds settled, or which may be settled to her separate use, will make up one clear amount, or clear yearly sum of 200*l.*, as and for her separate maintenance and support, during the joint lives of herself and the said John Ince, subject nevertheless to the proviso hereinafter contained; and the said Wilmot Parker, a trustee named by the said Catherine Ince, hath agreed to enter into the covenant hereinafter contained: Now this indenture witnesseth, that in pursuance and performance of the said agreement, the said John Ince doth hereby, for himself, his heirs, &c., covenant, promise and agree with and to the said Wilmot Parker as such trustee, his heirs, &c., in manner following, that is to say, that the said Catherine Ince may from time to time, and at all times hereafter, live separate and apart from the said John Ince her husband, as if she were sole and unmarried,

&c. And further, that he the said John Ince shall and will yearly and every year during the joint lives of him the said John Ince and Catherine Ince, well and truly pay or cause to be paid, into the proper hands of the said Wilmot Parker as such trustee for the said Catherine Ince as aforesaid, to and for her sole and separate use and benefit, or to such person or persons as she, in writing signed with her proper hand, shall from time to time, notwithstanding her coverture direct, or appoint, such sum as together with the dividends and interest or other income to arise from the sum of 948*l.* 6*s.* 4*d.* Bank 3 per cent. Annuities standing to the credit of a certain cause in the Court of Chancery of *Cumming v. Brewer*, or from other funds settled, or which may be settled to her separate use, and which may be received by her, will make one clear annuity or yearly sum of 200*l.*, such annuity to commence from the 11th day of January last past, and to be paid by four even and equal quarterly payments, on the 11th day of April, the 11th day of July, the 11th day of October, and the 11th day of January in every year, without any abatement or deduction whatever; the first payment thereof, less the sum of 20*l.*, which has been paid on account thereof to the said Catherine Ince at or before the sealing and delivering of these presents, to be made on the 11th day of April now next ensuing. And this indenture also witnesseth, that for and in consideration of the covenants and agreements hereinbefore on the part and behalf of the said John Ince, and also for and in consideration of the sum of 5*s.*, &c. by the said John Ince to the said Wilmot Parker, as such trustee as aforesaid in hand well and truly paid, &c., he the said Wilmot Parker for himself, his heirs, &c., doth covenant, &c. to and with the said John Ince, his executors, &c., by these presents in manner following (that is to say) that the said Catherine Ince shall not at any time here-

1859.

PARKER

v.  
INCE.

1859.  
 PARKER  
 v.  
 INCE.

after molest or disturb the said John Ince, or require or by any means whatever, either by ecclesiastical censure, or by taking out any citation or process, or by commencing or instituting any suit whatsoever, or in any other manner, endeavour to compel the said John Ince to cohabit or live with her, or to compel any restitution of conjugal rights. And further, that the said Wilmot Parker, as such trustee as aforesaid, his heirs, &c., shall and will, from time to time, and at all times hereafter, well and sufficiently save, defend, and keep harmless and indemnified the said John Ince, his heirs, &c., and his and their real and personal estate, of, from and against all and every the debt and debts which the said Catherine Ince already hath contracted, or shall or may at any time or times hereafter during the said separation contract, with any person or persons whomsoever, and every part thereof; and of and from all actions, suits, claims and demands whatsoever on account thereof; Provided always and it is hereby agreed and declared to be the true intent and meaning of these presents and of the said parties, that in case the said John Ince and Catherine his wife shall, at any time hereafter, with their mutual consent come together and cohabit, as man and wife, that then, and in such case, and from thenceforth, the said annuity or yearly sum necessary to make up the said annuity of 200*£*, hereinbefore covenanted and agreed to be paid, shall cease and be no longer payable; and from thenceforth all the covenants and agreements hereinafter contained on the part and behalf of the said Wilmot Parker, as such trustee as aforesaid, shall become absolutely null and void to all intents and purposes whatsoever, anything hereinbefore contained to the contrary thereof in anywise notwithstanding. In witness," &c.

The defendant and his said wife are still living separately from each other, and they have never come together,

or cohabited as man and wife since the execution of the said deed.

No other funds have been settled to the separate use of the defendant's said wife save and except the sum of 948*l.* 6*s.* 4*d.*, 3 per cent. Annuities, mentioned in the said deed. The quarterly payment to be made by the defendant, in pursuance of the said deed, on the 11th day of October, 1857, was 50*l.*, no part of which has been paid. On the 29th day of September, 1856, the defendant was adjudicated bankrupt, and on the 27th day of November, 1857, he duly obtained his certificate of conformity as such bankrupt. The plaintiff did not prove, or attempt to prove, any debt or claim in respect of the said annuity, against the said defendant under his said bankruptcy.

The question for the opinion of the Court is, whether or not the plaintiff is entitled to recover in this action.

If the Court shall be of opinion in the affirmative, judgment is to entered for the plaintiff for 50*l.* and costs of suit; and if in the negative, then judgment shall be entered for the defendant, with costs of defence.

*Petersdorff*, Serjt., argued for the plaintiff (*a*).—The question is, whether the covenant to make these quarterly payments constitutes a demand which was capable of being proved under the bankruptcy of the defendant pursuant to the provisions of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106). The covenant is subject to several contingencies. First: there is the contingency of the duration of the joint lives of the defendant and his wife. This, if it stood alone, might be capable of valuation. But, secondly, the amount payable is to be subject to re-

(*a*) In Michaelmas Term, November 10. Before *Pollock*, C. B., *Martin*, B., *Watson*, B., and *Channell*, B.

1859.

PARKER

v.  
INCK.

1859.  
 PARKER  
 v.  
 INCE.


duction, the amount of such reduction depending upon the dividends, interest, or other income to arise from the sum 948*l.* 6*s.* 4*d.*, settled on the wife. Thirdly, such amount is to be further reduced by the income to arise from other funds settled, which may or may not on some subsequent event be realized; or fourthly, by the income from funds which may hereafter be settled. Therefore, the future amount of the annual payments to which the defendant may be liable cannot be even surmised. As to the duration of the annuity there is the additional contingency that it is to cease if the defendant and his wife should again cohabit. It is therefore impossible to fix in any manner the value of the covenant. The clause enabling parties to prove the value of annuities, (sect. 175), applies only to annuities granted for a pecuniary consideration. In the case of *In re Foster* (a) the amount of the payment was subject to similar contingencies, and it was held that the covenantee could not prove against the estate of the bankrupt, the covenantor, in respect of instalments becoming due subsequent to the bankruptcy. That case arose under the 6 Geo. 4, c. 16. Section 177 of the Bankrupt Consolidation Act, 1849, is a repetition of the 56th section of that Act. *Ex parte Davis* (b) shews that a contingency depending on the separation of husband and wife, and of a widow not marrying again, is incapable of valuation, and therefore that a proof in respect of a sum payable on such contingency could not be admitted. [*Bramwell*, B.—If this case is within the statute at all it is within the 178th section.] In *Warburg v. Tucker* (c) a covenant by the defendant to pay premiums of insurance on his own life, and if he did not pay them, that the plaintiff might pay them, and the defendant would repay him, was held not to be

(a) 9 C. B. 422.

(c) 5 E. & B. 384, affirmed in

(b) Mont. 121; S. C. on appeal, error Trin. Vac. 1858.  
 Mont. 297.

“ a liability to pay money upon a contingency ” within the 178th section, because the contingencies were incapable of valuation.

1859.  
  
 PARKER  
 v.  
 INCE.

*Wilde* (with whom was *J. A. Russell*), for the defendant.—The case of *Warburg v. Tucker* (a) bears no analogy to the present case. A covenant, which is the subject of proof, must be a covenant to pay money to the person who proves; but it was not so in that case. There the plaintiff, a creditor of the defendant, held a policy of insurance on the defendant's life as a security for his debt. The covenant was not to pay the premiums of insurance to the plaintiff, but to third parties. The plaintiff's right was only to be compensated in damages if he should sustain injury by reason of the defendant's failure to keep up the policy. The plaintiff's claim sounded wholly in damages, and was in no sense a debt. There was therefore no “ liability to pay money on a contingency.” In the Court of Exchequer Chamber *Williams, J.*, put the case expressly upon that ground. *Young v. Winter* (b) was a case of the same kind. Here there is a covenant to pay money to the plaintiff. In *Ex parte Parratt* (c) an annuity payable while a person should continue to superintend brine pits, which might have been discontinued by the brine not flowing, or by the forfeiture of the lease of the brine pits, was held capable of valuation. The Court gave no reasons for their judgment in *In re Foster* (d), but if the decision proceeded on the difficulty of ascertaining the value of the contingency, which was necessary under the 6 Geo. 4, c. 16, s. 56, the case is intelligible, and will not govern one which arises under the 178th section of the Act now in force.

(a) 5 E. & B. 384.

Ayr. 626, S. C.

(b) 16 C. B. 401.

(d) 9 C. B. 422.

(c) 1 Dea. 696; 2 Mont. &

1859.  
 PARKER  
 v.  
 INCE.

It having been suggested that the same point was pending in the Exchequer Chamber in a case of *Boyd v. Robins* (a), this case was adjourned until the present Term (January 17), when

*Wilde* resumed his argument for the defendant.—The case of *Boyd v. Robins* has no bearing on this case. There the plaintiff had received from the defendant a guarantee for any goods which he might from time to time supply to a third person to the extent of 200*l.*; and there was a clause which enabled the defendant to put an end to the guarantee. The defendant became bankrupt, and after notice of his bankruptcy and certificate the plaintiff supplied goods to the extent of 200*l.* The Court of Exchequer Chamber (reversing the judgment in the Court of Common Pleas) held that this was not a “*liability*” to pay money on a contingency within the 178th section of the Bankrupt Law Consolidation Act, 1849. Here there is a “*liability*.” The alleged difficulties against this debt being proved, are, in effect, twofold. First, it is suggested that it is incapable of valuation: secondly, that by reason of the clause of cohabitation it may altogether cease. As to the first objection, a valuation must take place under the 175th, 176th, 177th and 178th sections of the Act. By the 175th, the Court is to ascertain the value of the annuity: by the 176th, the annuitant must prove for the value of his annuity: by the 177th, which is a re-enactment of the 56th section of the 6 Geo. 4, c. 16, the Court may set a value upon a debt payable upon a contingency: and by the 178th, proof may be made in respect of a liability to pay money upon a contingency which shall not have happened. This latter clause in guarded terms omits the word “*value*,” and says that “in every such case, if such liability be not proveable

(a) Decided Nov. 29, 1858.

under any other provisions of this Act, the person with whom such liability has been contracted shall be admitted to claim for *such sum as the Court shall think fit*." Therefore in the case of a *debt* payable on a contingency the Court is to value upon it, but if it be a mere *liability* to pay money on a contingency, the Court is to say for what amount the claim is to be admitted. There is no more difficulty in setting a value on this covenant, than in the case of compensation for a house or land required for a railway; or in case of an assault. [*Pollock*, C. B.—Suppose a person who was surety for another keeping the peace become bankrupt, and before his certificate the peace was broken and he was called upon to pay, is that a case contemplated by the Act?] There no liability would exist until the contingency happened; here there is an absolute covenant to pay money, and instead of a contingent event creating the liability, it continues until a contingent event puts an end to it. Under the old law a distinction was taken between a mere contingent debt and a legal debt liable to be defeated on a contingency: *Staines v. Planck* (a). In *Ex parte Tindal* (b) it was held that a debt payable on a contingency was proveable under the 56th section of the 6 Geo. 4, c. 16. A probability of receiving a sum of money may be valued according as the probability is near or remote. In like manner the value of a doubtful debt, or the good will of a business, is capable of calculation. Here the Court of Bankruptcy would look at all the circumstances,—the probability of one of the parties dying, of their again living together, or of the wife receiving an additional amount from the dividends or under the settlement. As to the other objection, *Ex parte Parratt* (c) is an authority that the circumstance of the annuity being

1859.  
  
 PARKER  
 D.  
 INCE.

(a) 8 T. R. 386.

(b) 8 Bing. 402.

(c) 2 Mont. &amp; Ayr. 626.

1859.  
 PARKER  
 v.  
 ISCE.


subject to a defeazance does not prevent it being proveable.—  
 He also referred to *Ex parte Barwis* (a).

*Petersdorff*, Serjt., was not called upon to reply.

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to recover. We ought to take the fair meaning of the language used in this act of parliament, whatever may be its policy, whether for the protection of the debtor against the creditor, or for advancing the remedy of the creditor. No doubt the interest of the creditor is as much regarded as the interest of the debtor. It was considered a great hardship, that when a trader granted an annuity for a sum of money and afterwards became bankrupt, the annuitant had no power to do anything under the fiat, but merely a right to sue a pauper. The clause respecting annuities is quite as much for the benefit of the creditor as for the relief of the bankrupt. The intent of all the later statutes relating to bankruptcy has been to enlarge the relief to traders, but at the same time to enlarge the remedy of creditors. If this particular claim is included in the Act, we are bound to hold that the bankrupt is discharged from it; if it is not included, the plaintiff is entitled to judgment. I do not think that a covenant to pay such a sum of money as will make up a certain sum after taking into account a variety of securities, is an “annuity” within the 175th section of the Act. If this had been a covenant to pay an annual sum *simpliciter*, I doubt whether the fact of its being defeasible would have prevented it from being proveable as an annuity within that section. I do not think that a covenant to pay a sum of money year after year is within the 178th section. That section is directed to the payment upon a contingency of one sum of money, and it

(a) 25 L. J. Bank. 10.

was never intended that there should be a calculation year after year of sums periodically due. It seems to me therefore that this being neither an annuity within the 175th section, nor a sum of money payable on a contingency within the 178th section, was not proveable under either, and that our judgment ought to be for the plaintiff.

1859.  
  
 PARKER  
 v.  
 INCE.

MARTIN, B.—I am of the same opinion. On the argument of the case of *Warburg v. Tucker* (a) I gave these clauses of the Act as much consideration as I could bestow on any subject, for it was supposed that the judgment of the Court of Common Pleas in *Young v. Winter* (b) was opposed to that of the Court of Queen's Bench in *Warburgh v. Tucker*. The true mode of construing the Act is to ascertain whether the contract, under which the liability arises, is fairly within the provisions of the Act, both with respect to the interest of the creditor and the interest of the bankrupt. By this contract the plaintiff is entitled to the payment of such a sum of money as, together with the dividends from certain stock or other funds mentioned, will make a clear annuity of 200*l.*, payable quarterly, with a proviso, that if the parties shall again live together as man and wife the covenant shall cease. That cannot be such an annuity as would fall within the 175th section, because a value cannot be put upon it. How is it possible to calculate the probability of a man and his wife who are separated living together again? Their doing so depends on their character, temper, and disposition, and it may be a variety of other circumstances. Then is it money payable upon a contingency within the 178th section? I think it is not. The liability to pay money within that section is where a single sum of money is payable on a contingency, and in such case the Court is to say for what sum the claim is to be

(a) In error Trin. Vac. 1858.

(b) 16 C. B. 401.

1859.  
PARKER  
v.  
INCE.

made. The object is to enable the creditor to be paid in the event of the money becoming payable. Here there is no contingency of that kind. Applying to the Act the ordinary rule of construction, what the legislature contemplated was one sum of money becoming payable upon a contingency; but if the statute be construed as requiring the plaintiff to prove at the end of the first quarter and then at the end of the second, and so on from quarter to quarter as the payments become due, the estate would never be wound up. That would be so unreasonable that I cannot persuade myself that this is a case within that section.

WATSON, B.—I entirely agree. We had these clauses under consideration in the Exchequer Chamber on more occasions than one, and I bestowed great attention upon them. I am clearly of opinion that this is not an annuity within the 175th section. It is not an annual sum capable of valuation. It is a covenant to pay to a trustee for the separate use of the bankrupt's wife such a sum as, together with certain dividends and interest, &c., will make a yearly sum of 200*l*. That is not annuity, for the amount of the dividends and interest, &c., may vary from time to time; and it must first be ascertained how much the wife gets from the 948*l*. 6*s*. 4*d*. Bank Annuities, and how much she has from funds settled to her separate use; then it will be seen how much is required to make up the 200*l*. According to my judgment, that is a payment which it is impossible to value. It would be necessary to put a valuation on the life of the wife, then to see how much she is likely to have from the Bank Annuities, and then how much from the money to be settled to her separate use. Such a payment does not bear a single characteristic of an annuity, which is the payment of a *certain sum* of money. I am also of

opinion that this is not a debt proveable under the 178th section. That clause only contemplates a liability to pay money upon a contingency, and it must be a large construction of the enactment to bring this case within it. Its object was to discharge bankrupts from a contingent liability, and on the other hand to enable creditors to be paid out of the effects. It enacts that if any bankrupt shall have contracted, "before the filing of a petition for adjudication of bankruptcy, a liability to pay money on a contingency,"—this money is not payable on a contingency, the liability ceases upon the parties again living together,—“the person with whom such liability has been contracted shall be admitted to claim for such sum as the Court shall think fit.” Therefore, under that section, the contingent liability is not a matter for valuation, but the Court is to fix the sum for which proof is to be made. According to the argument for the defendant, there must be successive valuations of each successive quarterly payment. The difficulty is to see upon what principle the Court could fix the amount. I concur with the judgment of the Court of Queen’s Bench in *Warburg v. Tucker* (a), that “the section seems to contemplate only the happening of one contingency whereupon the whole demand shall be ascertained.” Another ground is, that the money to be recovered on this covenant is not certain. If an action were brought, it could only be recovered in the shape of damages, and in order to ascertain their amount various calculations must be gone into. For these reasons I am of opinion that this is not a claim proveable either under the 175th or the 178th section.

CHANNELL, B.—I am also of opinion that the plaintiff is entitled to recover. It is argued that this claim is proveable

(a) 5 E. & B. 384. 396.

1859.  
PARKER  
v.  
INCE.

after molest or disturb the said John Ince, or require or by any means whatever, either by ecclesiastical censure, or by taking out any citation or process, or by commencing or instituting any suit whatsoever, or in any other manner, endeavour to compel the said John Ince to cohabit or live with her, or to compel any restitution of conjugal rights. And further, that the said Wilmot Parker, as such trustee as aforesaid, his heirs, &c., shall and will, from time to time, and at all times hereafter, well and sufficiently save, defend, and keep harmless and indemnified the said John Ince, his heirs, &c., and his and their real and personal estate, of, from and against all and every the debt and debts which the said Catherine Ince already hath contracted, or shall or may at any time or times hereafter during the said separation contract, with any person or persons whomsoever, and every part thereof; and of and from all actions, suits, claims and demands whatsoever on account thereof; Provided always and it is hereby agreed and declared to be the true intent and meaning of these presents and of the said parties, that in case the said John Ince and Catherine his wife shall, at any time hereafter, with their mutual consent come together and cohabit, as man and wife, that then, and in such case, and from thenceforth, the said annuity or yearly sum necessary to make up the said annuity of 200*l.*, hereinbefore covenanted and agreed to be paid, shall cease and be no longer payable; and from thenceforth all the covenants and agreements hereinafter contained on the part and behalf of the said Wilmot Parker, as such trustee as aforesaid, shall become absolutely null and void to all intents and purposes whatsoever, anything hereinbefore contained to the contrary thereof in anywise notwithstanding. In witness," &c.

The defendant and his said wife are still living separately from each other, and they have never come together,

or cohabited as man and wife since the execution of the said deed.

1859.  
 PARKER  
 v.  
 INCK.

No other funds have been settled to the separate use of the defendant's said wife save and except the sum of 948*l.* 6*s.* 4*d.*, 3 per cent. Annuities, mentioned in the said deed. The quarterly payment to be made by the defendant, in pursuance of the said deed, on the 11th day of October, 1857, was 50*l.*, no part of which has been paid. On the 29th day of September, 1856, the defendant was adjudicated bankrupt, and on the 27th day of November, 1857, he duly obtained his certificate of conformity as such bankrupt. The plaintiff did not prove, or attempt to prove, any debt or claim in respect of the said annuity, against the said defendant under his said bankruptcy.

The question for the opinion of the Court is, whether or not the plaintiff is entitled to recover in this action.

If the Court shall be of opinion in the affirmative, judgment is to entered for the plaintiff for 50*l.* and costs of suit; and if in the negative, then judgment shall be entered for the defendant, with costs of defence.

*Petersdorff*, Serjt., argued for the plaintiff (*a*).—The question is, whether the covenant to make these quarterly payments constitutes a demand which was capable of being proved under the bankruptcy of the defendant pursuant to the provisions of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106). The covenant is subject to several contingencies. First: there is the contingency of the duration of the joint lives of the defendant and his wife. This, if it stood alone, might be capable of valuation. But, secondly, the amount payable is to be subject to re-

(*a*) In Michaelmas Term, November 10. Before *Pollock*, C. B., *Martin*, B., *Watson*, B., and *Channell*, B.

1859.

~  
PARKER  
v.  
INCE.


duction, the amount of such reduction depending upon the dividends, interest, or other income to arise from the sum 948*l.* 6*s.* 4*d.*, settled on the wife. 'Thirdly, such amount is to be further reduced by the income to arise from other funds settled, which may or may not on some subsequent event be realized; or fourthly, by the income from funds which may hereafter be settled. Therefore, the future amount of the annual payments to which the defendant may be liable cannot be even surmised. As to the duration of the annuity there is the additional contingency that it is to cease if the defendant and his wife should again cohabit. It is therefore impossible to fix in any manner the value of the covenant. The clause enabling parties to prove the value of annuities, (sect. 175), applies only to annuities granted for a pecuniary consideration. In the case of *In re Foster* (a) the amount of the payment was subject to similar contingencies, and it was held that the covenantee could not prove against the estate of the bankrupt, the covenantor, in respect of instalments becoming due subsequent to the bankruptcy. That case arose under the 6 Geo. 4, c. 16. Section 177 of the Bankrupt Consolidation Act, 1849, is a repetition of the 56th section of that Act. *Ex parte Davis* (b) shews that a contingency depending on the separation of husband and wife, and of a widow not marrying again, is incapable of valuation, and therefore that a proof in respect of a sum payable on such contingency could not be admitted. [*Bramwell*, B.—If this case is within the statute at all it is within the 178th section.] In *Warburg v. Tucker* (c) a covenant by the defendant to pay premiums of insurance on his own life, and if he did not pay them, that the plaintiff might pay them, and the defendant would repay him, was held not to be

(a) 9 C. B. 422.

(c) 5 E. &amp; B. 384, affirmed in

(b) Mont. 121; S. C. on appeal, error Trin. Vac. 1858.  
Mont. 297.

“ a liability to pay money upon a contingency ” within the 178th section, because the contingencies were incapable of valuation.

1859.  
  
 PARKER  
 v.  
 INCE.

*Wilde* (with whom was *J. A. Russell*), for the defendant.—The case of *Warburg v. Tucker* (a) bears no analogy to the present case. A covenant, which is the subject of proof, must be a covenant to pay money to the person who proves; but it was not so in that case. There the plaintiff, a creditor of the defendant, held a policy of insurance on the defendant's life as a security for his debt. The covenant was not to pay the premiums of insurance to the plaintiff, but to third parties. The plaintiff's right was only to be compensated in damages if he should sustain injury by reason of the defendant's failure to keep up the policy. The plaintiff's claim sounded wholly in damages, and was in no sense a debt. There was therefore no “ liability to pay money on a contingency.” In the Court of Exchequer Chamber *Williams, J.*, put the case expressly upon that ground. *Young v. Winter* (b) was a case of the same kind. Here there is a covenant to pay money to the plaintiff. In *Ex parte Parratt* (c) an annuity payable while a person should continue to superintend brine pits, which might have been discontinued by the brine not flowing, or by the forfeiture of the lease of the brine pits, was held capable of valuation. The Court gave no reasons for their judgment in *In re Foster* (d), but if the decision proceeded on the difficulty of ascertaining the value of the contingency, which was necessary under the 6 Geo. 4, c. 16, s. 56, the case is intelligible, and will not govern one which arises under the 178th section of the Act now in force.

(a) 5 E. & B. 384.

Ayr. 626, S. C.

(b) 16 C. B. 401.

(d) 9 C. B. 422.

(c) 1 Dea. 696; 2 Mont. &


1859.  
 PARKER  
 v.  
 INCE.

It having been suggested that the same point was pending in the Exchequer Chamber in a case of *Boyd v. Robins* (a), this case was adjourned until the present Term (January 17), when

*Wilde* resumed his argument for the defendant.—The case of *Boyd v. Robins* has no bearing on this case. There the plaintiff had received from the defendant a guarantee for any goods which he might from time to time supply to a third person to the extent of 200*l.*; and there was a clause which enabled the defendant to put an end to the guarantee. The defendant became bankrupt, and after notice of his bankruptcy and certificate the plaintiff supplied goods to the extent of 200*l.* The Court of Exchequer Chamber (reversing the judgment in the Court of Common Pleas) held that this was not a “*liability*” to pay money on a contingency within the 178th section of the Bankrupt Law Consolidation Act, 1849. Here there is a “*liability*.” The alleged difficulties against this debt being proved, are, in effect, twofold. First, it is suggested that it is incapable of valuation: secondly, that by reason of the clause of cohabitation it may altogether cease. As to the first objection, a valuation must take place under the 175th, 176th, 177th and 178th sections of the Act. By the 175th, the Court is to ascertain the value of the annuity: by the 176th, the annuitant must prove for the value of his annuity: by the 177th, which is a re-enactment of the 56th section of the 6 Geo. 4, c. 16, the Court may set a value upon a debt payable upon a contingency: and by the 178th, proof may be made in respect of a liability to pay money upon a contingency which shall not have happened. This latter clause in guarded terms omits the word “*value*,” and says that “in every such case, if such liability be not proveable

(a) Decided Nov. 29, 1858.

1859.

  
 PARKER  
 v.  
 INCE.

under any other provisions of this Act, the person with whom such liability has been contracted shall be admitted to claim for *such sum as the Court shall think fit*." Therefore in the case of a *debt* payable on a contingency the Court is to value upon it, but if it be a mere *liability* to pay money on a contingency, the Court is to say for what amount the claim is to be admitted. There is no more difficulty in setting a value on this covenant, than in the case of compensation for a house or land required for a railway; or in case of an assault. [*Pollock*, C. B.—Suppose a person who was surety for another keeping the peace become bankrupt, and before his certificate the peace was broken and he was called upon to pay, is that a case contemplated by the Act?] There no liability would exist until the contingency happened; here there is an absolute covenant to pay money, and instead of a contingent event creating the liability, it continues until a contingent event puts an end to it. Under the old law a distinction was taken between a mere contingent debt and a legal debt liable to be defeated on a contingency: *Staines v. Planck* (a). In *Ex parte Tindal* (b) it was held that a debt payable on a contingency was proveable under the 56th section of the 6 Geo. 4, c. 16. A probability of receiving a sum of money may be valued according as the probability is near or remote. In like manner the value of a doubtful debt, or the good will of a business, is capable of calculation. Here the Court of Bankruptcy would look at all the circumstances,—the probability of one of the parties dying, of their again living together, or of the wife receiving an additional amount from the dividends or under the settlement. As to the other objection, *Ex parte Parratt* (c) is an authority that the circumstance of the annuity being

(a) 8 T. R. 386.

(b) 8 Bing. 402.

(c) 2 Mont. &amp; Ayr. 626.

1859.

PARKER

v.  
INCE.

subject to a defeazance does not prevent it being proveable.—  
He also referred to *Ex parte Barwis* (a).

*Petersdorff*, Serjt., was not called upon to reply.

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to recover. We ought to take the fair meaning of the language used in this act of parliament, whatever may be its policy, whether for the protection of the debtor against the creditor, or for advancing the remedy of the creditor. No doubt the interest of the creditor is as much regarded as the interest of the debtor. It was considered a great hardship, that when a trader granted an annuity for a sum of money and afterwards became bankrupt, the annuitant had no power to do anything under the fiat, but merely a right to sue a pauper. The clause respecting annuities is quite as much for the benefit of the creditor as for the relief of the bankrupt. The intent of all the later statutes relating to bankruptcy has been to enlarge the relief to traders, but at the same time to enlarge the remedy of creditors. If this particular claim is included in the Act, we are bound to hold that the bankrupt is discharged from it; if it is not included, the plaintiff is entitled to judgment. I do not think that a covenant to pay such a sum of money as will make up a certain sum after taking into account a variety of securities, is an “annuity” within the 175th section of the Act. If this had been a covenant to pay an annual sum *simpliciter*, I doubt whether the fact of its being defeasible would have prevented it from being proveable as an annuity within that section. I do not think that a covenant to pay a sum of money year after year is within the 178th section. That section is directed to the payment upon a contingency of one sum of money, and it

(a) 25 L. J. Bank. 10.

1859.  
 PARKER  
 v.  
 INCE.

was never intended that there should be a calculation year after year of sums periodically due. It seems to me therefore that this being neither an annuity within the 175th section, nor a sum of money payable on a contingency within the 178th section, was not proveable under either, and that our judgment ought to be for the plaintiff.

MARTIN, B.—I am of the same opinion. On the argument of the case of *Warburg v. Tucker* (a) I gave these clauses of the Act as much consideration as I could bestow on any subject, for it was supposed that the judgment of the Court of Common Pleas in *Young v. Winter* (b) was opposed to that of the Court of Queen's Bench in *Warburgh v. Tucker*. The true mode of construing the Act is to ascertain whether the contract, under which the liability arises, is fairly within the provisions of the Act, both with respect to the interest of the creditor and the interest of the bankrupt. By this contract the plaintiff is entitled to the payment of such a sum of money as, together with the dividends from certain stock or other funds mentioned, will make a clear annuity of 200*l.*, payable quarterly, with a proviso, that if the parties shall again live together as man and wife the covenant shall cease. That cannot be such an annuity as would fall within the 175th section, because a value cannot be put upon it. How is it possible to calculate the probability of a man and his wife who are separated living together again? Their doing so depends on their character, temper, and disposition, and it may be a variety of other circumstances. Then is it money payable upon a contingency within the 178th section? I think it is not. The liability to pay money within that section is where a single sum of money is payable on a contingency, and in such case the Court is to say for what sum the claim is to be

(a) In error Trin. Vac. 1858.

(b) 16 C. B. 401.

1859.  
PARKER  
v.  
INCE.

made. The object is to enable the creditor to be paid in the event of the money becoming payable. Here there is no contingency of that kind. Applying to the Act the ordinary rule of construction, what the legislature contemplated was one sum of money becoming payable upon a contingency; but if the statute be construed as requiring the plaintiff to prove at the end of the first quarter and then at the end of the second, and so on from quarter to quarter as the payments become due, the estate would never be wound up. That would be so unreasonable that I cannot persuade myself that this is a case within that section.

WATSON, B.—I entirely agree. We had these clauses under consideration in the Exchequer Chamber on more occasions than one, and I bestowed great attention upon them. I am clearly of opinion that this is not an annuity within the 175th section. It is not an annual sum capable of valuation. It is a covenant to pay to a trustee for the separate use of the bankrupt's wife such a sum as, together with certain dividends and interest, &c., will make a yearly sum of 200*l*. That is not annuity, for the amount of the dividends and interest, &c., may vary from time to time; and it must first be ascertained how much the wife gets from the 948*l*. 6*s*. 4*d*. Bank Annuities, and how much she has from funds settled to her separate use; then it will be seen how much is required to make up the 200*l*. According to my judgment, that is a payment which it is impossible to value. It would be necessary to put a valuation on the life of the wife, then to see how much she is likely to have from the Bank Annuities, and then how much from the money to be settled to her separate use. Such a payment does not bear a single characteristic of an annuity, which is the payment of a *certain sum* of money. I am also of

opinion that this is not a debt proveable under the 178th section. That clause only contemplates a liability to pay money upon a contingency, and it must be a large construction of the enactment to bring this case within it. Its object was to discharge bankrupts from a contingent liability, and on the other hand to enable creditors to be paid out of the effects. It enacts that if any bankrupt shall have contracted, "before the filing of a petition for adjudication of bankruptcy, a liability to pay money on a contingency,"—this money is not payable on a contingency, the liability ceases upon the parties again living together,—“the person with whom such liability has been contracted shall be admitted to claim for such sum as the Court shall think fit.” Therefore, under that section, the contingent liability is not a matter for valuation, but the Court is to fix the sum for which proof is to be made. According to the argument for the defendant, there must be successive valuations of each successive quarterly payment. The difficulty is to see upon what principle the Court could fix the amount. I concur with the judgment of the Court of Queen’s Bench in *Warburg v. Tucker* (a), that “the section seems to contemplate only the happening of one contingency whereupon the whole demand shall be ascertained.” Another ground is, that the money to be recovered on this covenant is not certain. If an action were brought, it could only be recovered in the shape of damages, and in order to ascertain their amount various calculations must be gone into. For these reasons I am of opinion that this is not a claim proveable either under the 175th or the 178th section.

CHANNELL, B.—I am also of opinion that the plaintiff is entitled to recover. It is argued that this claim is proveable

(a) 5 E. & B. 384. 396.

1859.  
PARKER  
v.  
INCE.

1859.  
PARKER  
v.  
INCE.

under the 175th section as “an annuity.” In my opinion it is not. It is not a covenant to pay a specific sum of money during the joint lives of the bankrupt and his wife, but a covenant to pay such a sum as, together with the income from certain Bank Annuities or other funds settled to the separate use of the wife, shall amount to 200*l.* a year. It seems to me that, having regard to the uncertainty of the sum covenanted to be paid, this is not an annuity proveable under the 175th section. Then is it a debt payable upon a contingency within the 177th section, or a liability to pay money upon a contingency within the 178th section? The language of the 178th section is new; that of the 177th section corresponds with the language of the 56th section of the 6 Geo. 4, c. 16; and there is this manifest distinction between them—the one points to a *debt* contracted by the bankrupt, the other to a *liability*, and that may include a class of cases which might not come within the definition of “debts.” But although there is that difference in the sections, that the one points to a debt the other to a liability, each points to a contingency. In my opinion the contingency mentioned in the 177th section is the same contingency as that mentioned in the 178th section; and I think that this is not a contingency of that description. Under the 177th section the Court is to ascertain the value of the debt; under the 178th the claim is to be admitted for such as the Court shall think fit. That means one single claim which may be valued or allowed prospectively, not a claim which must be valued from time to time and depending on a variety of contingencies. I am therefore of opinion that this is not an annuity, or a debt, or liability, proveable under either of these sections.

Judgment for the plaintiff.

1859.

ANN HARDCASTLE, Administratrix of THOMAS HARDCASTLE,  
v. THE SOUTH YORKSHIRE RAILWAY AND RIVER DUN  
COMPANY.

Jan. 21.

**D**ECLARATION—That the defendants were possessed of certain land near to and adjoining a certain [(a) common and public footway, and also of a certain large reservoir, hole or dam, then being in and upon the said land and within a short distance of the said common and public footway and then containing a large quantity of water; and the existence of the said reservoir, hole or dam, so being in and upon the said land and so adjoining the said] common and public footway was dangerous to any person passing along the footway, either by night or day, even if ordinary caution were employed by such person; and it was the duty of the defendants, before, &c., to have so sufficiently guarded, fenced off and railed in the said land and the reservoir, &c., as to prevent damage or injury to any person lawfully passing in and along the footway; yet the defendants, while they were so possessed of the said land and also of the reservoir, wrongfully permitted the said land and also the reservoir to be wholly unguarded and not fenced off or railed in: that by means of the premises and for want of proper and sufficient guarding, fencing off and

Where an excavation is made near to but not substantially adjoining a public highway, at common law no action lies against the owner of the land by a person who has strayed off the highway and fallen into such excavation.

(a) The learned Judge at the trial having pointed out that there was no obligation to fence, it was proposed to amend the declaration by substituting for the words between brackets [*ancient common and public footway, and made and constructed a certain large reservoir, hole or dam in*

and upon the said land within a short distance of the said common public footway, and *filled the same with a large quantity of water; and the existence of the said reservoir, hole or dam so containing the said water* so being in and upon the said land and so adjoining the said *ancient*].

1859.  
 ~~~~~  
 HARDCASTLE  
 v.  
 SOUTH  
 YORKSHIRE  
 RAILWAY  
 AND  
 RIVER DUN  
 COMPANY.

railing in of the same, the said Thomas Hardcastle, who was lawfully passing in and along the said footway, lost his way and missed his path and fell into the reservoir and was thereby killed, &c.

Pleas.—First: Not guilty. Secondly, that the existence of the reservoir was not dangerous to any person passing along the highway by night or day, if ordinary caution was employed by such person. Thirdly, that it was not the duty of the defendants to have so sufficiently guarded, fenced off and railed in the said land and reservoir, so as to prevent damage to persons passing along the footway.

Upon these pleas issue was joined.

At the trial, before Martin, B., at the Yorkshire Summer Assizes, it appeared that the plaintiff was the widow and administratrix of Thomas Hardcastle. The defendants were the proprietors of the River Dun Navigation. On the night of the 23rd of May, 1858, the deceased left Rotherham to walk to Sheffield. The footpath from Rotherham to Sheffield is an ancient footpath leading along the side of the canal for about 300 yards to a point at which it is bounded on one side by a lock, and on the other by a small cutting or by-wash for passing the surplus water. At this point the pathway turns to the right over a bridge crossing the by-wash. A person continuing straight on in the direction of the pathway, and not turning to the right in order to go over the bridge, would, if not prevented by the arms of a lock upon the canal, find himself upon a grassy spot or buttress, about five yards long by seven broad, between the lock and the by-wash, level with the footway, wholly unfenced, and having a fall of about three yards to the water. On the morning of the 24th deceased was found drowned just below this point. About twenty-four years ago the defendants' predecessors as proprietors of the navigation, made a new cut. The cut consisted of


a large reservoir out of which were two branches, one the canal for the boats to navigate in, the other the by-wash above mentioned. The division between these two branches was the buttress or projecting wall: the water for the canal passing on one side, the water for the by-wash passing on the other. The bridge was from seven to ten yards from the end of the buttress. It was assumed on both sides that the deceased had walked up the footway along the canal and then, instead of turning to the right and going over the bridge, continued to walk straight on, and walked into the reservoir at the end of the buttress near to the point where the body was found. Evidence was given that the deceased was intoxicated, and there was conflicting evidence as to whether the place at which the deceased fell in was dangerous.

Upon these facts the learned Judge directed the jury that the defendants were bound to fence this place, reserving leave to the defendants to move to enter a verdict on the third plea; the Court to be at liberty to amend the pleadings in any way they might think fit. He left it to the jury to say whether the place was dangerous, and whether the defendants were guilty of negligence in leaving it unfenced; and secondly, whether the deceased by the exercise of ordinary caution could have avoided the danger: saying that the jury would probably think that the defendants ought not to have left the way in a state dangerous to drunken men. The jury found that the place was dangerous to persons using ordinary caution; that Hardcastle's death was not caused by any negligence or any drunkenness or misconduct on his part; that he was using ordinary caution, and that his death was caused solely by the dangerous nature of the locality. A verdict was entered for the plaintiff.

*Atherton*, in Michaelmas Term, obtained a rule nisi to

1859.  
  
**HARDCASTLE**  
 v.  
**SOUTH**  
**YORKSHIRE**  
**RAILWAY**  
 AND  
**RIVER DUN**  
**COMPANY.**

1859.

  
**HARDCASTLE**  
 v.  
**SOUTH**  
**YORKSHIRE**  
**RAILWAY**  
**AND**  
**RIVER DON**  
**COMPANY.**

enter a verdict for the defendants upon the ground that the alleged duty of the defendants to fence was not proved; or why the judgment should not be arrested, on the ground that the declaration did not shew facts from which the alleged duty arose in point of law.

*Overend* shewed cause (a).—Before this bridge was made there was a public highway on solid ground which has since been intersected by the new cut. The cut is a nuisance to the highway. It is “a nuisance to dig a ditch or make a hedge overthwart the highway, &c., or to do any other act which renders it less commodious:” *Bac. Abr. Highways* (D.). The nuisance need not be on the highway itself. Thus a gunpowder mill adjoining a highway may be a nuisance to the highway: *Rex v. Taylor* (b). So it is a nuisance to keep a mischievous animal near a highway. The enjoyment of the road was rendered less secure by leaving this excavation unfenced. In *Furnstone v. Whee-ly* (c), *Pollock*, C. B., said:—“Suppose a person digs so near a highway as to render it dangerous unless fenced by day and lighted by night, &c., there being a duty to guard the public, a person injured would have a right to sue in case.” *Coupland v. Hardingham* (d) and *Barnes v. Ward* (e) shew that an action for negligence in not railing in an area adjoining the highway may be maintained by one who falls into it. [*Pollock*, C. B.—That is different from the case where a pit is dug near a highway into which a man cannot fall unless he first trespasses on the land adjoining the highway. *Martin*, B.—In *Barnes v. Ward* (e) the danger might have affected a person on the footway

(a) Jan. 11. Before *Pollock*,  
C. B., *Martin*, B., *Watson*, B.,  
and *Channell*, B.


(b) 2 Stra. 1167

(c) 2 D. & L. 208.

(d) 3 Camp. 398: see 9 C. B.  
413. 419.

(e) 9 C. B. 392.

itself. *Watson*, B.—Do you contend that if a shaft is sunk in an open uninclosed country within fifty or sixty yards of the highway (*a*), the owner is bound to put up a fence against the highway? Why should not the person whose duty it is to repair the highway fence it?] In *Barnes v. Ward* (*b*), *Cresswell*, J., suggested that “the public may acquire a right something analogous to the servitude of the old Roman law, viz., that the land adjoining shall be left in such a state as to protect the public in the use of the highway.” [*Channell*, B.—The reservoir being made across the old line of road, though the right of way over what is now the reservoir only have been extinguished by some statutable authority, yet it remains up to the reservoir.]

1859.  
  
 HARDCASTLE  
 v.  
 SOUTH  
 YORKSHIRE  
 RAILWAY  
 AND  
 RIVER DUN  
 COMPANY.

*Atherton* and *Cleasby*, in support of the rule.—It must be taken that the persons who constructed the reservoir acted lawfully. The declaration treats the existing way as the ancient way. And the question is whether the construction of the reservoir near to the ancient footway imposed on the defendants or their predecessors the obligation of guarding, fencing, or railing off their own land. [*Martin*, B.—There is probably no duty to fence, but the reservoir in an unfenced state may be a nuisance to the footway.] It is not denied that if an individual does anything on or adjacent to a highway which is a nuisance to persons on the highway, and damage is thereby caused to any one, an action is maintainable. An action might have been sustained in the present case if the state of things had rendered the use of the way less commodious. [*Martin*, B.—The jury found that the plaintiff was using the way with sufficient care and caution, and that the place was rendered dangerous by the acts of the defendants.] Suppose a person cuts a deep trench at the side of a highway,

(*a*) See 5 & 6 Wm. 4, c. 50, s. 70.

(*b*) 9 C. B. 392.

1859.  
  
 HARDCASTLE  
 v.  
 SOUTH  
 YORKSHIRE  
 RAILWAY  
 AND  
 RIVER DUN  
 COMPANY.

the trench may be dangerous to persons who are actually on the highway itself. Here, if persons do not stray off the road they are in no danger. If the injury is caused by straying it is not the result of that which is alleged to be the unlawful act. In *Barnes v. Ward* (a) the ground of the decision was that the unfenced area was a nuisance to the way itself; since the excavation abutted on the highway.—They referred also to *The Manchester, Sheffield and Lincolnshire Railway Company, App., v. Wallis, Resp. (b)*, and *Roberts v. The Great Western Railway Company (c)*. [*Martin, B.*, referred to *Manley v. The St. Helen's Canal and Railway Company (d)*].

*Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—This action was tried before my brother *Martin* at the last Yorkshire Assizes. The jury found a verdict for the plaintiff, and the defendants had leave to move to enter a verdict for them, upon a traverse of an averment in the declaration, that the defendants were bound to fence a reservoir mentioned in it. The parties had also leave to amend the pleadings, and the plaintiff, before the argument upon a rule obtained by the defendants to enter the verdict for them upon the leave reserved, made an amendment. It is immaterial to refer to it, because we think that not only upon the traverse but upon the facts of the case, as proved at the trial, the defendants are entitled to our judgment. The plaintiff was the widow and administratrix of Thomas Hardcastle who was drowned upon the 22nd of May, 1858. The defendants are the proprietors of a navigation called “The Dun Navigation.”

(a) 9 C. B. 392.


(b) 14 C. B. 213.


(c) 4 C. B. (N. S.) 506.

(d) 2 H. & N. 840.

Upon the night of the day before mentioned, the intestate left Rotherham to walk to Sheffield, but was drowned in the place hereafter described. The action was brought against the defendants under Lord Campbell's Act. The defendants' predecessors were the proprietors of the navigation, and about twenty-four years ago they made a new cut. The cut consisted of a large reservoir out of which there were two branches, one a canal for the boats to navigate in, the other a by-wash for the surplus water to flow away. The division between these two branches was a buttress or projecting wall; the water for the canal passing on one side, the water going through the by-wash passing on the other. There was an ancient footpath from Rotherham to Sheffield, which passed along the by-wash, was continued over it by a bridge, and then proceeded to Sheffield. The bridge was from seven to ten yards from the end of the buttress or projecting wall, and a person who continued to walk straight up the pathway along the by-wash, and who did not turn a little to the right in order to go over the bridge would, unless prevented by the arm of a gate to a lock upon the canal, get upon a grassy spot, and if he continued walking on would go over the buttress or projecting wall into the reservoir. It was assumed upon both sides that the intestate had walked up the footway along the by-wash, and then instead of turning to the right and going over the bridge, continued to walk straight on and went into the reservoir at the end of the buttress and was drowned. At the trial a statement was made that the course of the way was altered when the new cut was made, but no evidence was given of this, nor indeed is the cause of action alleged in the declaration founded upon it; and after such a lapse of time we think it must be taken that the present way is the lawful one.

The authority relied upon by the plaintiff was *Barnes v.*

1859.  
  
 HARDCASTLE  
 v.  
 SOUTH  
 YORKSHIRE  
 RAILWAY  
 AND  
 RIVER DUN  
 COMPANY.

1859.  
  
**HARDCASTLE**  
 v.  
**SOUTH**  
**YORKSHIRE**  
**RAILWAY**  
**AND**  
**RIVER DUN**  
**COMPANY.**

*Ward (a)*, and with the judgment in that case we entirely concur. The facts there were, that the defendant being possessed of land abutting on a public footway excavated an area in the course of building a house immediately adjoining the footway and left it unprotected, and a person walking in the night time fell in and was killed. The Court held that the defendant was liable. The principle of the decision was that such an excavation was a public nuisance, and that an individual injury arising from such a nuisance was the subject-matter of an action, to the party aggrieved.

That a private injury arising from a public nuisance is the subject-matter of an action for damages is a doctrine as old as any in the common law; and if we were of opinion that the state of the reservoir in the present case was a nuisance to the footpath, and that the plaintiff was substantially in the right, notwithstanding that we thought the form of the declaration was defective, and that there was no such obligation to fence as therein alleged, we should be desirous to aid the plaintiff; but we are of opinion that she has no right of action against the defendants.

When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness,<sup>7</sup> or, in the case of a horse or carriage way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road on a dark night and losing his way may wander to any

(a) 9 C. B. 392.

extent, and if the question be for the jury no one could tell whether he was liable for the consequences of his act upon his own land or not. We think that the proper and true test of legal liability is, whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise,—if in every case it was to be left as a fact to the jury, whether the excavation were sufficiently near to the highway to be dangerous.

When a man dedicates a way to the public, there does not seem any just ground, in reason and good sense, that he should restrict himself in the use of his land adjoining, to any extent, further than that he should not make the use of the way dangerous to the persons who are upon it and using it; to do so would be derogating from his grant: but he gives no liberty or licence to the persons using the way to trespass upon his adjoining land, and if they in so doing come to misfortune, we think they must bear it, and the owner of the land is not responsible. If fences are to be put up, it would seem more reasonable that they should be put up by those who use the way, or those who are under the obligation to repair it, than by the person who dedicated it to the public, or his successors; and as we are clearly of opinion that there is no such obligation to fence, as alleged in the declaration, and also that, upon the above state of facts, there is no liability, our judgment is in accordance with the principle of the case of *Blyth v. Topham (a)*, which we think is the true one. The rule to enter a verdict for the defendant must therefore be made absolute.

Rule absolute.

(a) Cro. Jac. 158.

1859.  
  
 HARDCASTLE  
 v.  
 SOUTH  
 YORKSHIRE  
 RAILWAY  
 AND  
 RIVER DUN  
 COMPANY.

1859.

Jan 19.

YOUNG v. HUGHES.

An administration bond given to the ordinary before the 20 & 21 Vict. c. 77 came into operation, is not assignable, under the 83rd section of that Act, so as to entitle the assignee to sue upon it in his own name: and the 21 & 22 Vict. c. 95, s. 15, has not a retrospective effect, so as to enable the assignee to maintain an action commenced by him in his own name before that Act passed.

**DECLARATION**—John Young, assignee of the bond hereinafter mentioned, to whom the said bond has been assigned by A. F. Bayford, one of the registrars of her Majesty's Court of Probate, by order of the Right Honorable Sir Cresswell Cresswell, Knight, Judge of the said Court, and pursuant to the statute in such case made and provided, by &c., his attorney, sues &c.: For that, on the 14th January A.D. 1854, one A. Oxby and the defendant, and one M. Brandwood, by bond of that date, under their respective hands and seals, acknowledged themselves to be holden and firmly bound unto the Right Reverend &c. Lord Bishop of Chester in the sum of 4000*l.*, to be paid unto the said Lord Bishop, &c., with a condition thereunder written.—(The declaration then set out the condition, which was in the usual form, for exhibiting an inventory, duly administering, and making an account; and breaches were assigned in the terms of the condition.)—That after the said bond had become forfeited, and before the passing of an act of parliament passed &c. (21 & 22 Vict. c. 95), the now defendant was cited (to wit under and by virtue of a monition issued in due form of law from and out of the Consistory Court of the said Lord Bishop of Chester, bearing date the 5th day of November, 1857,) to appear in the said Consistory Court at the time and place in that behalf mentioned in the said monition, and then and there to shew cause (amongst other things) why the aforesaid bond should not be permitted to be sued for at common law; which said monition and the proceedings therein were pending in the said Consistory Court when the said act of parliament came into operation. That after the said

Act came into operation, to wit on the 15th day of February, 1858, her Majesty's Court of Probate, on application made to that Court in a summary way pursuant to the provisions of the said Act and the rules and practice of the said Court, and on being satisfied that the condition of the said bond had been broken, ordered A. F. Bayford, then being one of the registrars of the said Court, to assign the said bond to J. Young (the now plaintiff) in the said order named. And afterwards, on the 26th day of February A. D. 1858, the said A. F. Bayford, then being such registrar as aforesaid, by indorsement on the said bond made and signed by him as such registrar and sealed with the seal of the said Court of Probate, in pursuance of the said order and of the provisions of the said act of parliament, assigned the said bond to the plaintiff. Whereupon the plaintiff became entitled to sue upon the said bond in his own name and to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of the aforesaid breaches respectively of the said condition of the said bond, according to the provisions of the said Act.—The declaration then alleged non-payment of the 4000*l.* to the Bishop of Chester, or to the plaintiff as such assignee, or to any other persons, and concluded with an averment that the plaintiff, as assignee as aforesaid, and as a trustee for all persons interested, according to the provisions of the said Act, brings this suit &c.

Demurrer and joinder therein. The joinder in demurrer was dated the 20th of April, 1858, and the case was in the special paper for argument in last Trinity Term.

*Tomlinson*, in support of the demurrer.—The question is, whether, after the passing of the 20 & 21 Vict. c. 77, this bond could be assigned to the plaintiff so as to enable him to sue upon it in his own name. It is submitted that the

1859.  
YOUNG  
v.  
HUGHES.

1859.  
YOUNG  
v.  
HUGHES.

action must be brought in the name of the Bishop. The 21 Hen. 8, c. 5, s. 3, was the first Act which enabled the Ordinary to take surety for the true administration of the effects of an intestate. The 22 & 23 Car. 2, c. 10, s. 1, required all Ordinaries, having power to commit administration of the goods of persons dying intestate, to "take sufficient bonds with two or more able sureties, respect being had to the value of the estate, in the name of the Ordinary." The 2nd section prescribes the form of the condition, which has been followed in this case. By section 3, such bonds are declared "to be good to all intents and purposes, and pleadable in any Courts of justice;" but there is no provision as to assigning them. That Act was made perpetual by the 1 Jac. 2, c. 17, s. 5. Therefore, under that state of the law, administration bonds were assignable in equity only. Then, has the 20 & 21 Vict. c. 77 made any alteration in the law, as to the power of assigning bonds given before that Act came into operation? The 1st section provides that the Act "shall come into operation on such day, not sooner than the 1st day of January, 1858, as her Majesty shall by order in council appoint." The day appointed was the 11th January, 1858. By section 3, the testamentary jurisdiction of ecclesiastical and other Courts is abolished; and, by section 4, such jurisdiction is vested in her Majesty, and is to be exercised in her name in a Court to be called the Court of Probate. By section 23, the Court of Probate shall be a Court of record, and shall have the same powers throughout all England, and in relation to the personal estate in all parts of England of deceased persons, as the Prerogative Court of the Archbishop of Canterbury now has in the province of Canterbury: provided that no suits for legacies, or suits for the distribution of residues, shall be entertained by the Court. Section 80 repeals so much of the 21 Hen. 8, c. 5,

and the 22 & 23 Car. 2, c. 10, and the 1 Jac. 2, c. 17, "as requires any surety, bond, or other security to be taken from a person to whom administration shall be committed." Section 81 enacts that "every person to whom any grant of administration *shall* be committed shall give bond to the Judge of the Court of Probate," &c., "and, if the Court of Probate shall require, with one or more surety or sureties, conditioned for duly collecting, getting in, and administering the personal estate of the deceased," &c. By section 82, "*Such* bond shall be in a penalty of double the amount under which the estate and effects of the deceased shall be sworn," &c. By section 83, "The Court may, on application made on motion or petition in a summary way, and on being satisfied that the condition of any *such* bond has been broken, order one of the registrars of the Court to assign the same to some person, to be named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond, in his own name, both at law and in equity, as if the same had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of any breach of the condition of the said bond." The language of the 81st section applies to *future* bonds only; the 82nd section contains the same language and relates to the same bonds; and the 83rd section is clearly in respect of the same subject-matter. If these enactments were intended to apply to other bonds, the language would have been "bond to the Judge of the Court of Probate, *or to the Ordinary*." The 84th section provides for the transfer to the Court of Probate of all suits then pending in any Court in England respecting any grant of probate or administration. The 86th section renders valid all grants of probates and administrations made before the commence-

1859.

YOUNG  
v.  
HUGHES.

1859.  
YOUNG  
v.  
HUGHES.

ment of that Act, which might be void or voidable by reason only that the Courts from which the same respectively were obtained had not jurisdiction to make such grants. The 87th section enacts that "legal grants of probate and administration made before the commencement of that Act, and grants of probate and administration made legal by that Act, shall have the same force and effect as if they had been granted under that Act, &c.; and all inventories and accounts in respect thereof shall be returnable to the Court of Chancery, and all bonds taken in respect thereof may be enforced by or under the authority of the Court of Chancery, at the discretion of the Court." There is therefore this distinction: bonds given under that Act to the Court of Probate may be enforced by order of that Court; but with respect to bonds given before that Act to the Ordinary, the Court of Chancery is substituted for the abolished Ecclesiastical Court. The words "such bond" in the 83rd section cannot apply to bonds given under the old system, for it provides that the assignee shall have the same right to sue on the bond as the Judge who assigns it. On the 2nd August, 1858, the 21 & 22 Vict. c. 95 passed, to amend the previous Act. By section 15 of the 21 & 22 Vict. c. 95, "Bonds given to any archbishop, bishop, or other person exercising testamentary jurisdiction in respect of grants of letters of administration made prior to the 11th day of January, 1858, or in respect of grants made in pursuance of the Court of Probate Act or of this Act, whether taken under a commission or requisition executed before or after the said 11th day of January, shall enure to the benefit of the Judge of the Court of Probate, and, if necessary, shall be put in force in the same manner and subject to the same rules (so far as the same may be applicable to them) as if they had been given to the Judge of the said Court subsequently to that day." This statute has not

a retrospective effect: *Moon v. Durden* (a), *Pinhorn v. Souster* (b), *Williams v. Smith* (c).

The Court then called on

1859.

YOUNG  
v.  
HUGHES.

Dr. *Phillimore* (with whom was *Cole*) to support the declaration.—It is conceded that the 20 & 21 Vict. c. 77 came into operation when the Consistorial Court of the Bishop of Chester was at an end; but it never could have been the intention of the legislature that no Court should have jurisdiction over these bonds. It is assumed that the jurisdiction is transferred to the Court of Chancery by the 87th section of that Act; but the object of that section was to provide for cases where an administration was granted with a stamp duty insufficient to cover the personal estate, and it was necessary to obtain a new grant with the proper stamp duty. That construction is corroborated by the latter part of the section, which provides that the inventories and accounts shall be returnable to the Court of Chancery. If the plaintiff's construction be correct, there was no occasion for the provision of the 15th section of the 21 & 22 Vict. c. 95. [*Martin*, B.—The words of the 87th section of the 20 & 21 Vict. c. 77, are, “all bonds taken in respect thereof,” that is of “legal grants of probate and administration made before the commencement of this Act.” New powers are given to the new Judge in respect of probate; but for some reason the legislature did not think fit to transfer to him the old bonds, but left them to be enforced by the Court of Chancery.] On the motion in the Court of Probate, that this bond “be attended with” for the purpose of suit, it was submitted that the Court had authority to deal with it as a matter testamentary in a suit transferred with all its

(a) 2 Exch. 22.

(b) 8 Exch. 138.

(c) 2 H. & N. 443.

1859.  
YOUNG  
v.  
HUGHES.

incidents by the 84th section; the learned Judge ordered the bond to be assigned, leaving the Court of common law to deal with the question of its validity: *Young v. Oxley* (a). Neither the Consistorial Court nor the Court of Chancery having jurisdiction, this is either a *casus omissus* in the Act, or it was intended by implication to transfer the authority to the Court of Probate. That it was not the intention to omit this case appears from the latter part of the 23rd section, which provides that no suits for legacies, or suits for the distribution of residues, shall be entertained by the Court. Therefore where it was intended that the Court of Probate should have no jurisdiction, it is so stated in express terms. The 4th section gives the Court "full authority to hear and determine all questions relating to matters and causes testamentary;" and this case falls within that category. It would be competent for the Court of Probate to revoke this grant of administration; then how can it be said that the Court has no power to deal with the bond? The 83rd section may be construed by the light of the 84th, which says that "all suits, whether original or by way of appeal," &c., "shall be transferred." It was competent for the Court of Probate to deal with this bond, either under the old practice, viz., to order it "to be attended with" for the purpose of putting it in suit, or under the new practice prescribed by the 83rd section. The learned Judge elected to take the new power given by the statute. The 84th section having transferred all existing suits, by implication gave the Court a power over this bond. But, at all events, the 21 & 22 Vict. c. 95 has a retrospective operation. The 14th section provides for the transfer of all non-contentious business pending in any Ecclesiastical Court at the time when "The Court of Pro-

(a) 1 Sw. & Tr. 25.

bate Act" came into operation. Then the 15th section provides for bonds given to any archbishop, bishop, &c., in respect of grants of administration prior to the 11th day of January, 1858. A statute may have a retrospective effect not only by express words, but by necessary implication. [*Pollock, C. B., referred to Roadknight v. Green (a).*] In *Warne v. Beresford (b)* the defendant set up a defence under a statute which was repealed after plea pleaded and before trial. A verdict having been found for the defendant, this Court held that they must give judgment according to the law then in existence.

1859.

YOUNG  
v.  
HUGHES.

POLLOCK, C. B.—I am of opinion that the action cannot be maintained. The question arises in this way.—The 20 & 21 Vict. c. 77 makes assignable administration bonds given to the Judge of the Court of Probate. This is not a bond given to the Judge of that Court, but a bond given under the old system to the Bishop of Chester as Ordinary. The inconvenience of suits upon such bonds, after the 20 & 21 Vict. c. 77, was discovered, and the 21 & 22 Vict. c. 95 was passed to remedy it, and to make bonds given to an Ordinary assignable in the same way as bonds given to the Judge of the Court of Probate. But the Act did not come in force until the 2nd August, 1858, whereas this case was in the paper for argument in Trinity Term, 1858, and it is conceded that if it had been then argued the Court must have given judgment for the defendant. The question is whether there is anything in the 21 & 22 Vict. c. 95, which makes it retrospective, so as to change the position of the parties to the suit, and refer it back to the time when the case was standing for argument and judgment. I think that there is not, whatever may be our opinion as to what the legislature might have intended;

(a) 9 M. &amp; W. 652.

(b) 2 M. &amp; W. 848.

1859.

YOUNG  
v.  
HUGHES.

for although, where the language of an Act satisfies the Court as to what must have been intended, that is sufficient ground for construing it so as to give effect to that intention; what might have been intended ought not to operate in the same way. No doubt the only effect of our judgment is that the plaintiff must begin over again, and probably get a fresh order of assignment from the Court of Probate, but we cannot decide the case on that ground.

MARTIN, B.—I am of the same opinion. I collect from the report of *Young v. Orley* (a) that the Judge of the Probate Court gave no opinion on the point, whether the assignment was valid. It is a well known rule that a bond is not assignable at common law, so as to enable the assignee to sue upon it in his own name. That being the rule of law, the first question is, what is the true construction of certain sections of the 20 & 21 Vict. c. 77, beginning with section 80, and especially section 83? It is clear that the power to assign given by the 83rd section relates to bonds given to the Judge of the new Court, and has no reference to bonds given to any Court previously existing. It is difficult to say what is the true construction of the 87th section; but, according to the ordinary rule, I should have thought that the intention of the legislature was to transfer to the Court of Chancery the power over all bonds taken in respect of legal grants of probate and administration made before the commencement of the Act, and grants of probate and administration made legal by that Act. This is a bond given upon a grant of administration. After the execution of the bond and before the assignment of it the jurisdiction of the old Courts ceased, and the new Court came into operation; and I think that under the 20 & 21 Vict. c. 77, the Judge of the Court of Probate had no power to assign such a bond.

(a) 1 Sw & Tr. 25.

Then has the assignment been rendered valid by the 21 & 22 Vict. c. 95? I think it has not. The Act contains no express words for that purpose. It would require strong language to give the Act a retrospective operation, though it would be sufficient if the intention appeared by necessary implication. But there is nothing to shew by necessary implication that the Act is retrospective. We should be glad, if we could, so to construe it, as it is desirable to save expense, but we must apply to it that construction which is the legal and real effect of the words used. The general rule that statutes are to be construed as applying to the future not to the past was acted on by the Court of Exchequer Chamber in *Vansittart v. Taylor* (a), where all the members of the Court, except *Platt*, B., were of opinion that the 34th section of the Common Law Procedure Act, 1854, was prospective only, and did not authorize an appeal on a rule to enter a verdict granted after the Act came into operation on a point reserved at a trial before the Act received the Royal Assent.

WATSON, B.—I am of the same opinion. There is no provision in the 20 & 21 Vict. c. 77 for assigning a bond of this kind so as to give the assignee a right to sue in his own name. The 83rd section, which empowers the Court to order one of its registrars to assign the bond, and enables the assignee to sue upon it in his own name, clearly applies only to bonds given after the constitution of the Court of Probate. The 84th section transfers all pending suits to the Court of Probate, there to be dealt with and decided according to the rules and practice of that Court; but it gives no power to the Court to assign bonds already given. Upon reading the words of the Act, there is no difficulty, and there is nothing in it to shew any intention of the

(a) 4 E. & B. 910.

1859.

YOUNG  
v.  
HUGHES.

1859.  
 ~~~~~  
 YOUNG  
 v.  
 HUGHES.

legislature that bonds given before the Act should be assigned; on the contrary, the legislature repudiates the idea of the Court of Probate dealing with them, and, by the 87th section, provides that all such bonds may be enforced by the Court of Chancery. Then, with respect to the 21 & 22 Vict. c. 95, there is nothing to shew that it has a retrospective operation. The language of the 15th section is entirely prospective. It says that bonds given to any archbishop, &c. *shall* enure to the benefit of the Judge of the Court of Probate, and, if necessary, *shall* be put in force in the same manner as if they had been given to the Judge of that Court. It does not make good assignments of these bonds theretofore made by the Judge, but only says that assignments thereafter made shall be valid.

CHANNELL, B.—I am also of opinion that the defendant is entitled to judgment. In considering the question whether the plaintiff can maintain this action as assignee of the bond, the Court is called upon to see whether at the time of the joinder in demurrer he had any right of action. I am of opinion that he had not. If the case be looked at with reference to the law as it stood prior to the 20 & 21 Vict. c. 77, it will admit of no doubt; and I am clearly of opinion that the 83rd section of that Act does not confer on the plaintiff any right to maintain this action. I am disposed to agree with my brother *Martin's* construction of the 87th section, and to think that the legislature intended that these bonds should be under the jurisdiction of the Court of Chancery. Then comes the 21 & 22 Vict. c. 95, the 14th and 15th sections of which are relied on. I do not say whether the words of those sections may or may not have some retrospective operation: it is enough to say that they do not legalise this action, which was brought before that Act passed.

Judgment for the defendant.

1859.

THE METROPOLITAN SALOON OMNIBUS COMPANY  
(LIMITED) v. HAWKINS.

Jan. 24.

**D**ECLARATION—The Metropolitan Saloon Omnibus Company (Limited), duly incorporated by the style and name aforesaid under and by virtue of the provisions of a certain act of parliament &c. (19 & 20 Vict. c. 47), by &c., their attorney, sue &c.: For that the defendant falsely and maliciously did publish in a certain letter addressed and sent by the defendant to one R. Bevan the words following. (The declaration then set out the letter, which imputed to the Company insolvency, mismanagement, and an improper and dishonest carrying on of its affairs.) The declaration concluded with an allegation that by means of the committing of the grievances by the defendant the Company were greatly damaged, injured, and brought into public disgrace and contempt, and the value of the property of the Company and of the shares therein was depreciated.

A Joint Stock Company, incorporated under the 19 & 20 Vict. c. 47, may maintain an action for libel against a shareholder in the Company.

Plea—That, before and at the time of the committing of the grievance, the defendant was a shareholder in the Company, and has ever since continued to be, and was at the commencement of this suit, and now is, a shareholder in the said Company.

Demurrer and joinder therein.

*Edwards*, in support of the demurrer.—To an action for libel by a Company incorporated under the 19 & 20 Vict. c. 47 it is no answer that the defendant is a shareholder in the Company. If it were, this consequence would follow, that a person who bought a share in a joint stock bank might with impunity publish any slander against it. For

1859.

METROPO-  
LITAN SALOON  
OMNIBUS CO.  
v.  
HAWKINS.

the purposes of this action the defendant is a stranger to the corporation. [*Pollock*, C. B.—A corporation may maintain an action against one of its members to recover a penalty incurred by violating a bye-law.]

The Court then called on

*Stammers* to support the plea.—First, this is not the case of a municipal corporation, in which the individual members are merged in the corporate body; but it is a quasi corporation created by the Joint Stock Companies Act (19 & 20 Vict. c. 47, s. 4), for the purposes of trade, and which is termed in the Act “a partnership.” In *Ernest v. Nicholls* (a) Lord *Wensleydale* said, with reference to companies of this kind: “The legislature then devised the plan of incorporating these companies in a manner unknown to the common law, with special powers of management and liabilities.” So, in *Smith v. The Hull Glass Company* (b), *Wilde*, J., said: “I am not aware that what is called a joint stock trading company, if in fact a partnership exists between the shareholders, differs from an ordinary partnership in this respect.” Again, in *Ridley v. The Plymouth Grinding and Baking Company* (c), *Parke*, B., speaks of these joint stock companies as quasi corporations, and for some purposes a partnership. [*Channell*, B.—Those were cases of contract.] Though the 13th section of the 19 & 20 Vict. c. 47, s. 4, uses the words “body corporate,” yet the companies created under it are in the same position as under the 7 & 8 Vict. c. 110. Therefore the Company, being only a quasi corporation, is for the purposes of this action a partnership, and a member of it cannot sue himself: *Story on Partnership*, § 220, *Moffat and Others v. Van Millingen* (d), *Neale v. Turton* (e).

(a) 6 H. L. 419.

(b) 8 C. B. 676.

(c) 2 Exch. 711.

(d) 2 B. & P. 124, note.

(e) 4 Bing. 149.

[*Martin*, B.—Suppose this had been an ordinary partnership; I do not see why the other partners might not have maintained an action against one member who libelled the partnership (*a*).] All the shares in the Company might vest in one person, and it would be absurd to say that he could be at the same time both plaintiff and defendant.—Secondly, the declaration is also bad on the ground that a quasi corporation can only maintain an action in respect of matters necessarily incident to the purpose for which it was incorporated: *Paine v. The Guardians of the Strand Union* (*b*). [*Pollock*, C. B.—How are they to obtain redress for an injury done to their business by a libel?] They have a remedy by indictment or criminal information. [*Pollock*, C. B.—That would not repay them the money which they may have lost through the libel.]—Thirdly, if this Company is to be treated as anything more than a trading corporation, there is an entire merger of its personal character. There is no instance of a corporation having maintained an action for libel or slander. *Treby*, arguendo in the case of *The Quo Warranto against the City of London* (*c*), said “a corporation is but a name, an *ens rationis*, a thing, that cannot see or be seen, and indeed is no substance, nor can do or suffer wrong.” Under the Civil law, the ground of action was the *injuria*, the personal insult or contumely offered to the party defamed: Dig. lib. 47, tit. 10, l. 5, § 9, 1 Stark. on Slander, xxxi. In like manner, all the definitions of libel in our books describe it as an injury affecting personal character: *The Case de Libellis Famosis* (*d*), 2 Hawk. P. C. c. 73, s. 9, *Bell v. Stone* (*e*), Com. Dig. “Libel” (A), Bac. Abr. “Libel.” In *Bradley v. Methuyn* (*f*) Lord Hardwicke, C. J., observed

1859.  
  
 METROPO-  
 LITAN SALOON  
 OMNIBUS CO.  
 v.  
 HAWKINS.

(*a*) See *Robinson v. Marchant*,  
 7 Q. B. 918.

(*b*) 8 Q. B. 326.

(*c*) 8 How. St. Tr. 1039, 1138. 10th ed.

(*d*) 5 Rep. 124 b.

(*e*) 1 Bos. & P. 331.

(*f*) 2 Selw. N. P. 1039, note.

1859.  
 METROPO-  
 LITAN SALOON  
 OMNIBUS CO.  
 v.  
 HAWKINS.

that "the crime in a libel does not arise merely from the scandal, but from the tendency which it has to occasion a breach of the peace." A corporation has no character which can be injured by slander. [*Watson, B.*, referred to *Williams v. Beaumont (a)*.] Moreover, it might happen that the members who recovered the damages were not those who complained of the injury.

*Edwards* was not called upon to reply.

POLLOCK, C. B.—We are all of opinion that the plea cannot be sustained. That a corporation at common law can sue in respect of a libel there is no doubt. It would be monstrous if a corporation could maintain no action for slander of title through which they lost a great deal of money. It could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may. But it would be very odd if a corporation had no means of protecting itself against wrong; and if its property is injured by slander it has no means of redress except by action. Therefore it appears to me clear that a corporation at common law may maintain an action for a libel by which its property is injured. Then, has a corporation created under the 19 & 20 Vict. c. 47 the same power? Though that Act makes the partnership a corporation, Mr. *Stammers* says that this is merely for the purpose of carrying on the business mentioned in it, and that it can only sue in respect of matters necessarily incident to that purpose. But in order to carry on business it is necessary that the reputation of such a corporation should be protected, and therefore in the case of libel or slander it must have a

(a) 10 Bing. 260; 3 Moo. & S. 705.

remedy by action. With respect to the question of partnership, that raises a different consideration. An action cannot be brought by several partners against one of them, for a party cannot be both plaintiff and defendant. Then, can a quasi corporation, which as a body may sue other people, maintain an action for libel against one of its own members? There is no doubt that a corporation at common law can sue one of its members for a penalty incurred by breach of a bye-law; and why should not a quasi corporation possess similar powers? Such a corporation may recover a debt from one of its own members—indeed that is a very common form of action, and the money when recovered belongs to the whole body of which the defendant is a member. Then, if a quasi corporation may sue for the recovery of money, surely it must also have the power to protect itself against injury by an action for libel? Upon these grounds I think that the action is maintainable.


MARTIN, B.—I am of the same opinion. This is an action for libel, in which a joint stock company is plaintiff; and it is argued that such an action cannot be maintained. No doubt, in looking into the old books, nothing on the subject will be found; but in modern times there has sprung up a class of corporations which are trading bodies, such as dock and canal companies, and it is no where laid down that such corporations are deprived of the protection of the law in case they are libelled. If so, the Hull Dock Company might be libelled with impunity by one of its members asserting that a dock was in such a state that no vessel could come into it; but there is no pretence for saying that in such case the Company could not sue in respect of the injury done to its trade

1859.

METROPO-  
LITAN SALOON  
OMNIBUS Co.

v.  
HAWKINS.

1859.

  
 METROPO-  
 LITAN SALOON  
 OMNIBUS CO.  
 v.  
 HAWKINS.

by the libel. As my Lord said, there may be particular kinds of libel which cannot affect a corporation, but in respect of such libels as are injurious to it an action may be maintained. Then is it any answer that the libeller is a member of the corporate body? By the 19 & 20 Vict. c. 47, s. 4, the Company became in effect "a body corporate," that is, it has an existence separate and distinct from that of its members; and there is nothing to make an action by the body corporate an action by the individual members. If the defendant had been run over by an omnibus of the Company, according to Mr. *Stammers's* argument, he could have maintained no action for the injury done to him. But if a member of the corporation may maintain an action against it for injury to him, the corporation may maintain an action against him for injury to it. I said, in the course of the argument, that I did not see why, in the case of an ordinary partnership, the other members might not maintain an action against one partner who libelled it; and the case of *Longman v. Pole* (a) supports that view. That was an action by five members of a partnership firm, charging the defendant with colluding with the other partner to injure them. It was objected that the plaintiffs could not maintain the action in their joint names, they having no joint capacity independent of the other partner, and no joint partnership fund of their own distinct from him, at the time of the tort charged, and therefore it could not be to their joint damage. But Lord *Tenterden* said: "I think in point of law this action is maintainable; if a person colludes with one partner in a firm to enable him to injure the other partners, I think they can maintain a joint action against the person

(a) Moo. & M. 223.

so colluding." Here the defendant is a distinct person from the corporation who sues.

1859.

METROPO-  
LITAN SALOON  
OMNIBUS Co.  
v.  
HAWKINS.

WATSON, B.—I am also of opinion that the plaintiffs are entitled to judgment. It is said that no action for libel will lie by a quasi corporation, because it is created for certain purposes only, and does not differ from an ordinary partnership. But it is clear that an ordinary partnership would have a right to maintain an action against one of its members for injury to their real or personal property, and for all wrongs done to them. Then suppose the firm becomes incorporated, but not for all purposes, is the law to afford no protection to them? One of the safeguards to individuals against libel is the remedy by action; and I cannot conceive a proposition more dangerous than this, that because a company is incorporated they have no appeal to a Court of justice if they are libelled. During the argument I referred to the case in the Common Pleas of *Williams v. Beaumont (a)*, where a joint stock company were empowered to sue in the name of their chairman, and it was held that they might sue in his name for a libel on the Company. As to the plea of the defendant, it is difficult to deal with it. He says, in effect, "I am a member of the corporation, and therefore I have a right to libel it." That is a startling proposition. If it were true, a person might buy a single share in a banking company and libel it with impunity. Such a state of the law would utterly destroy the business of these companies. In this respect I cannot distinguish between corporations created

(a) 10 Bing. 260; 3 Moo. & S. 705. The report in Moore & Scott describes the Company as a corporation, but it appears by the report in Bingham that they were not. The 9th section of their Act, 53 Geo. 3, c. ccvi., provides "That nothing in this Act contained shall extend, or be deemed, construed, or taken to extend, to incorporate the said society or partnership."

1859.

**METROPO-  
LITAN SALOON  
OMNIBUS CO.  
v.  
HAWKINS.**

for certain purposes and corporations at common law ; they all have a perpetual succession and a common seal. Why are we to make a distinction when the legislature says that these joint stock companies shall be corporations ? It is one of the incidents of a corporation that it may sue and be sued in the corporate name, and for the purposes of the suit a member of the corporation is a mere stranger. It would make strange work in the law if we were to hold that the ordinary incidents of a corporation did not attach to companies incorporated by act of parliament.

Judgment for the plaintiff.

Jan. 31.

**THE ATTORNEY GENERAL v. JOHN BRUNNING.**

A testator having by a valid contract agreed to sell a freehold estate for 115,000*l.*, and received a deposit of 15,000*l.* in his lifetime, the contract was specifically performed and the remainder of the purchase money paid to his executor after his death. — *Held*, that probate duty was not payable in respect of any portion of the 115,000*l.* as part of the personal estate of the testator.

**I**NFORMATION to obtain payment of the probate duty payable in respect of the estate and effects of W. W. Hope, deceased, the testator hereinafter mentioned, and the question for the decision of the Court is whether the purchase money of part of the testator's real estate which was, at the time of his death, subject to a valid binding contract for sale, made and entered into by him in his lifetime, but not carried out and completed till after his death, is liable to probate duty.

2. The testator W. W. Hope, on the 15th of May, 1851, made his will, and thereby devised and bequeathed all his real and personal estate to V. H. Crosby, his heirs, executors, administrators and assigns absolutely, and appointed the defendant Brunning the sole executor thereof.

3. The testator died in January, 1855, and probate of the said will and codicil was, in June, 1855, duly granted out of the Prerogative Court of the Archbishop of Canterbury to the defendant Brunning, who thereupon became

the sole legal personal representative of the testator, and took upon himself the execution of his will.

4. On the 4th of September, 1854, the testator had entered into a written agreement with Mrs. Honoria Hungerford, as the guardian of Miss C. Thornhill, for the sale of a certain part of his real estate for the sum of 115,000*l*. This agreement was confirmed by order of the Court of Chancery, and was at the time of the testator's death a valid subsisting agreement for the sale of the real estate therein comprised, which he was liable specifically to perform. A deposit of 15,000*l* had, prior to the 28th of December, 1854, been actually paid into the hands of a stakeholder on account of the purchase money, and since the testator's death the said agreement has been specifically performed and carried into execution by the persons entitled to his estate, and the whole of the purchase money of 115,000*l* has been received by the defendant as the executor of the testator's will. The testator had, at the time of his death, a good marketable title to the real estate comprised in the said agreement, and the same was, after his death, approved of by the Court and accepted on behalf of the purchaser.

5. The estate of the testator in respect of which probate was to be granted was sworn by the defendant to be under 10,000*l*, and he paid the probate duty in respect of that sum amounting to 180*l*; but no part of the purchase money or sum of 115,000*l* was included in the said sum of 10,000*l*. If it had been so included, as it ought to have been, the probate duty payable on the testator's estate would have amounted and did in fact amount to the sum of 1800*l*, so that after giving the defendant credit for the sum of 180*l* actually paid by him, as before stated, the sum of 1620*l* still remains due from him on account of such duty, &c.

The information prayed that the defendant might answer

1859.

ATTORNEY  
GENERALv.  
BRUNNING.

1859.  
 {  
 ATTORNEY  
 GENERAL  
 v.  
 BRUNNING.

the premises and matters aforesaid; that it might be declared that the sum of 115,000*l.* formed part of the personal estate of the testator and was liable to probate duty, and that the amount payable in respect of such duty might be ascertained (if necessary) under the direction of the Court, and that the defendant as the executor of the testator's will might be decreed to pay such duty to the Receiver General of Inland Revenue on behalf of her Majesty, and that for the purposes aforesaid all proper accounts, &c. might be taken and made, the Attorney General on behalf of her Majesty waiving all pains, penalties, &c., and for further relief, &c.


The answer of the defendant admitted the facts charged in the information, but alleged that the testator's title to the real estate comprised in the agreement was after, but not before his death, approved by the Court and accepted on behalf of the infant purchaser.


The *Solicitor General* and *A. Hanson* argued for the Crown (*a*).—A person who has contracted to sell an estate has the legal ownership of the land, but only as a security for the payment of the purchase money. The beneficial interest in the land passes to the purchaser, and he becomes a trustee of the purchase money for the seller. In *Sugden's Vend. & Purch.*, p. 146 (*b*), it is said, "Equity looks upon things agreed to be done as actually performed; consequently, when a contract is made for sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor." And at page 148, "If the vendor die before payment of the purchase money, it will go to his executors and form part of his assets." The question is, whether such purchase money due to the

(*a*) Jan. 20. Before *Pollock*, and *Channell*, B.  
 C. B., *Martin*, B., *Watson*, B., (b) 13th edition.

testator is part of his estate in respect of which probate is granted. It is a *credit* of the testator. The testator having sold the estate, two forms of proceeding to recover the purchase money are open to his representatives, viz., an action at law or a suit for the specific performance of the contract. In either case probate would be essential to constitute a title to sue, and therefore it would be necessary to shew that the probate duty paid was sufficient to cover the value of the property. If the contract is not valid, or the title to the property turns out to be defective, so that the contract cannot be enforced, the liability to duty does not arise. Here, however, the purchaser, would have had no defence to a suit by the vendor for the purchase money. [*Martin, B.*—Suppose the vendee had refused to complete the purchase, and the vendor had sued for damages?] Probate duty would have been payable upon anything which the executor might have recovered in that action. The right of action is part of the property of the testator, and it cannot be that because the personalty may be of more or less value, as one or other remedy is adopted, that no probate duty at all is payable. The vendor had a right to compel the purchaser to complete the contract. In *Matson v. Swift* (a) a person had conveyed certain lands to trustees upon trusts for sale, and after payment of his debts to hold the balance in trust for himself, his executors and administrators, as part of his personal estate, without any equity in favour of his heir, notwithstanding that the estate might remain unconverted at the time of his death. The person who created the trust died, no sale having taken place in his lifetime. The Crown claimed probate duty upon the ground that the property was impressed with the character of personalty by the trust for sale. It was answered that although,

(a) 8 Beav. 368.

1859.  
  
 ATTORNEY  
 GENERAL  
 v.  
 BRUNNING.

1859.  
  
 ATTORNEY  
 GENERAL  
 v.  
 BRUNNING.

as between the heir at law and the executor, the heir could in no case claim, yet it did not follow that the land ever would be sold. If the personal representative were to pay the debts, he would be at liberty to say: "The sale was merely a mode of raising money to pay the debts. I was the person to be benefited. The Crown cannot insist that the land shall be sold." In that case the probate was not essential to give a title to the property, as it would have been to enable the executor to recover the purchase money here. The decision has, however, not been considered satisfactory. It may be argued that, supposing the defendant be liable to pay probate duty and the purchaser to have died before the completion of the purchase, double duty would have been payable. But if a debtor dies, probate is taken out in respect of the whole of his personal estate, and the executor, on paying the debts, may afterwards obtain a return of probate duty: 55 Geo. 3, c. 184, s. 40; 5 & 6 Vict. c. 79, s. 23 (a). In such a case duty would be payable by both parties in the first instance; but on payment of the price of the estate the purchaser's executor would have been entitled to get back the duty paid by him. So that unless the vendor is liable both would escape. In *Custance v. Bradshaw* (b) one of two partners died, the firm being possessed of a considerable real estate. Now, in equity, the only right which a partner has is to a share of the surplus money. If land forms a part of the assets of the firm, the interest of a partner in the land is of the same nature. Under these circumstances the Crown claimed probate duty in respect of the value of the land. But the Court said that, though the land was personal estate in a certain sense, yet the Crown had no right to say that the land should be turned into money; the partners might choose to divide it. In the present case

(a) See Trevor on Taxes on Succession, p. 57. (b) 4 Hare, 315.

1859.

ATTORNEY  
GENERAL  
v  
BRUNNING.

the price of the estate was property which the executor was entitled to recover by virtue of the probate. Lord Abinger, in *Platt v. Routh* (a), said, "Probate duty is granted in respect of such part only of the assets as the executor can recover by virtue of the probate." The money belonged to the executor, and in equity he could have recovered it. The heir at law would only have been a necessary party because he had a right to dispute the validity of the contract: *Roberts v. Marchant* (b). In *Cook v. Gregson* (c) it was held that the equity of redemption on a mortgage of a sum of money charged on land was *legal assets* in the hands of the executor. Vice Chancellor Kindersley pointed out that "the general principle is, that a Court of law would treat as assets every item of property come to the hands of the executor which he has recovered, or had a right to recover, merely *virtute officii*, i. e. which he would have had a right to recover if the testator had merely appointed him executor without saying anything about his property or the application thereof. \* \* The general principle applies to an equity of redemption of a chattel interest, whether real or personal; and such an equity of redemption would be legal assets." Applying that doctrine to the present case, this debt formed part of the *legal assets* of the testator, though it might possibly have been only recoverable in a Court of equity, because it came to his hands *virtute officii*. It is therefore liable to duty. In *Coates v. Brown* (d), in order to shew that the deceased possessed bona notabilia, the Court relied on the fact that in his lifetime he had bargained and sold an estate to one Cooper, resident without the jurisdiction of his diocesan. [*Martin*, B. —In that case there seems to have been a conveyance in the lifetime of the testator.]

(a) 6 M. &amp; W. 791.

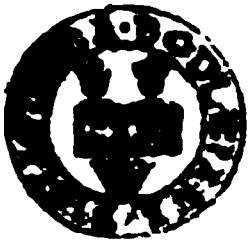
(c) 3 Drewry, 547.

(b) 1 Phillips, 370.

(d) 1 Add. 345.

1859.

ATTORNEY  
GENERAL  
v.  
BRUNNING.



*Phipson and Osler*, for the defendant.—The principles upon which this case must be decided are well settled, and have been distinctly enunciated in various cases on the subject of probate duty, though the precise point in this case has not been decided. Probate duty is payable on that part only of a testator's property which the Ordinary would have had jurisdiction to distribute in pios usus. That property is personal property, viz., such as was personalty at the time of the testator's death. The only other qualification of the proposition is that it must lie within the jurisdiction of the Ordinary. It is argued that where a testator dies seised in fee of real estate, probate duty may be payable on that estate as part of his personal estate. The reason assigned is that the owner having impressed on the property the character of personalty, the Court of Chancery treats it as such. But the nature of the property is not changed; the real meaning of the doctrine is this, that equity imputes a trust to the person having the legal estate in the property, to carry out the declared intention in favour of the persons intended to be benefited, and none other. The very case before the Court was put by Lord *Langdale* in *Matson v. Swift* (a). That case is an authority that where a testator in his lifetime has conveyed property in trust for sale, and thereby "converted it out and out," it is only considered as converted for the purposes declared, and not for fiscal purposes. It is admitted by the Crown that where there has been a contract for the sale of land, not carried out at the time of the decease of a testator, the probate duty will vary according to the contingency whether the purchase is completed or not. But how could the Ordinary have jurisdiction to distribute to pious uses real estate which may be personalty, or not, according to the issue of a doubtful suit as to whether there

(a) 8 Beav. 368 ; see p. 376.

is a good contract, or a good marketable title. The principle is, that the duty attaches upon that only which is in fact personalty at the time of the testator's death, and not upon that which is in fact realty. The duty is paid under the 55 Geo. 3, c. 184, schedule, part 3. The 38th section of the same statute provides that no ecclesiastical Court shall grant probate without an affidavit that the estate and effects of the deceased, in respect of which probate is to be granted, "are under the value therein specified," in order that the proper and full stamp duty may be paid on such probate. In *The Attorney General v. Hope* (a) it was held that probate duty was not payable on foreign bonds. Yet, to enable the executor to recover possession of the bonds in this country, it might have been necessary to obtain probate here. So probate may be necessary as evidence to enable an executor to avail himself of equitable assets. But the probate need not be stamped in respect of the value of such assets. Suppose in the present case the vendee had died, must the 115,000*l.* have been considered as land, and therefore not subject to probate duty in the hands of his executors? It is submitted that in such case duty must have been paid on the 115,000*l.*, and the executor of the vendee having paid it, would not have been entitled to recover it back. There was no debt due to the testator's estate at the time of his decease, there having been no actual conveyance of the land: *Green v. Bicknell* (b); per *Parke, B.*, *Hallen v. Runder* (c). *The Attorney General v. Dimond* (d), where it was held that probate duty was not payable in respect of French Rentes belonging to a testator dying in this country, though administered here, establishes that the probate is granted, not in respect of the assets generally, but in respect of such part of them as were, at the time of the testator's

1859.


ATTORNEY  
GENERAL  
v.  
BRUNNING.

(a) 1 C. M. &amp; R. 530.

(c) 1 C. M. &amp; R. 266; see p. 271.

(b) 8 A. &amp; E. 701.

(d) 1 C. &amp; J. 356.

1859.  
  
 ATTORNEY  
 GENERAL  
 v.  
 BRUNNING.

death, within the jurisdiction of the spiritual judge. *The Attorney General v. Hope* (a) is to the same effect. In *Pearse v. Pearse* (b) a testator domiciled in England had in the hands of his agents in India certain promissory notes of the East India Company, payable in India. The directors came to a resolution that the holders might have an option, which the testator exercised, of having them converted into stock and paid in this country. The conversion was not completed at the time of his death. The Vice Chancellor held that probate duty was not payable because, though there was no doubt of the testator's intention, there was no debt due to him which could have been sued for in this country. In *The Attorney General v. Bouwens* (c), it was held that probate duty was payable in respect of foreign bonds transferable by delivery here. But the Court affirm the principle that the jurisdiction to grant probate "can only be exercised in respect of those effects which he (the Ordinary) would have himself to administer in case of intestacy, and which must therefore have been so situated that he could have disposed of them *in pios usus*." The question then is, had the Ordinary jurisdiction? The tests are, the situs and the nature of the property. In *Platt v. Routh* (d) the question was, whether probate duty was payable in respect of a fund over which the testatrix had a general power of appointment, and the Court decided that no duty was payable on the probate, because the Ordinary never could under any circumstances have had any right to interfere with the property, and, whether probate was granted or not, the executor *quâ* executor could have no title to any part of the property. *Custance v. Bradshaw* (e) affirms the doctrine of *Matson v. Swift* (f). Though in the present case there was

(a) 1 C. M. & R. 530.

(b) 9 Sim. 430.

(c) 4 M. & W. 171.

(d) 6 M. & W. 756.

(e) 4 Hare, 315.

(f) 8 Beav. 368.

an actual sale in the lifetime of the testator, and not a mere direction to sell, the parties may never carry out the contract. The Crown cannot say they shall not release each other. In *Mules v. Jennings* (a), where the question arose on the Legacy Duty Act, the Lord Chief Baron pointed out that it would be an extremely inconvenient principle to introduce, "that the decision of to-day on the part of the individual entitled should give the Crown legacy duty; whereas, if he changed his opinion to-morrow, the Crown would have no such right." In order to entitle the Crown to probate duty, it is not enough to shew that, if this money had come to the hands of the executor, it would have been an answer to a plea of plene administravit. The right of the vendor to the purchase money is not a separate chattel interest, so as to fall within the class of bona notabilia, but is united to and mixed up with the ownership of the land. The vendor is not a *mere* trustee for the purchaser. A general devise of land in trust for sale, which would not pass trust estates, will pass an estate which the testator has contracted to sell: *Wall v. Bright* (b). In *Platt v. Routh* (c) it is said to be clear that no probate duty is payable where a charge on land is created by the owner of the fee simple.

*The Solicitor General*, in reply.—It is not denied that the test is, could the Ordinary have distributed the money to pious uses? But it is a fallacy to suppose that it is necessary to shew that the Ordinary could have sued for the debt. When the property vested in the Ordinary, neither he nor any other person could have sued: 2 Inst. 398. A right of action to the personal representatives of an intestate was

1859.

ATTORNEY  
GENERAL  
F.  
BRUNNING.

(a) 8 Exch. 830.

(b) 1 Jac. &amp; W. 494.

(c) 6 M. &amp; W. 756. 793.


1859.  
 ~~~~~  
 ATTORNEY  
 GENERAL  
 v.  
 BRUNNING.

given for the first time by 31 Ed. 1, stat. 1, c. 19. [*Martin, B.*—Do you contend that at common law the death of a person released debts due to him?]. If he died intestate. Probate duty is payable in respect of that property of which, if it had come to the hands of the Ordinary, he could have said that it was personal estate, and that therefore he was entitled to distribute it to pious uses. If the executor finds a contract which is *primâ facie* valid and enforceable, if he intends to treat it as a contract, and thinks it can be enforced, he is bound to treat it as part of the testator's personal estate, and pay duty upon it. If he is wrong, he can get a return of duty, under the 40th section of the 55 Geo. 3, c. 184. The claim of the Crown does not rest on the ground of any equitable conversion of the land, but is a claim to duty upon the price to be paid for it, which belongs to the executor. Therefore, supposing *Matson v. Swift* (a) and *Custance v. Bradshaw* (b) to be rightly decided, this case is distinguishable. In those cases there was no person from whom money was claimable at the death of the testator. [*Pollock, C. B.*—In the present case the money was clearly not due at law; a Court of common law could have done nothing, except perhaps give damages for a breach of the contract.] The executor would have had no difficulty in enforcing a specific performance in a Court of equity. He had a clear right in equity to the money, and his position was that of a mortgagee having a debt secured upon land. The real question is, in what character does the executor claim the purchase money? Does he claim as the person representing the personal estate, or as the person designated by the will to take? The executor claimed because the contract of the testator devolved upon him as executor:

(a) 8 Beav. 368.

(b) 4 Hare, 315.

therefore the right of suit on the contract was within the probate. *The Attorney General v. Bouwens* (a) shews that if a testator has property situate in this country in the shape of contracts which cannot be sued on here, yet if they can be sold and transferred by delivery, and so turned into money here, probate duty must be paid upon them.

1859.  
  
 ATTORNEY  
 GENERAL  
 v.  
 BRUNNING.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

MARTIN, B.—This is an information to recover probate duty. The testator William Hope, by a valid contract in writing, agreed to sell a freehold estate for 115,000*l.* At the time of the contract 15,000*l.* was paid as a deposit into the hands of a stakeholder. After his death the contract was specifically performed, and the whole purchase money paid to the defendant, as his executor. The title to the estate was a good marketable title, and was accepted on behalf of the purchaser, and the estate was lawfully conveyed to her.

The question is, whether this 115,000*l.* is subject to probate duty, and it depends upon the true construction of the statute 55 Geo. 3, c. 184, schedule, part 3. The statute imposes an *ad valorem* duty upon the value of the estate and effects of the testator, in respect of which the probate is granted; and by the 38th section the executor is to make an affidavit of the value of the estate and effects. In case of testaments, or intestacy, for centuries, until the establishment of the Probate Court, the jurisdiction was generally vested in the bishops of the diocese where the goods were situate, usually styled the Ordinary. It was their office, or that of the tribunals belonging to them, to judge of the validity of wills, and to grant to the executor probate or

(a) 4 M. & W. 171.

1859.  
 {  
 ATTORNEY  
 GENERAL  
 v.  
 BRUNNING.

authority to perform the directions of the will. The jurisdiction arose entirely by reason of the goods of deceased persons being locally situate within their jurisdiction. (See *Dyke v. Walford* (a), *Regina v. Commissioners of Stamps and Taxes, Re Ostell* (b).)

Upon strict legal considerations there is no doubt that probate could not be granted in respect of freehold land contracted to be sold, but not conveyed. At the time of the death of the testator it was realty, and would on his death vest in the heir. In an action against the heir, on the obligation of his ancestor, the estate would be assets on an issue of *riens per descent*. If the contract was broken in the lifetime of the testator, the executor might bring an action for damages. If broken after the testator's death the executor could only sue, if at all, for the damage to the personal estate. In either case the damages might be merely nominal.

A Court of equity, on the other hand, for some purposes, treats the realty in such case as impressed with the character of personalty. In equity, a thing agreed to be done is looked upon as done, and Lord St. Leonards, in his book on Vendors and Purchasers, chap. 4, sect. 1, paragraphs 1, 7, 8, says, that where a contract is made for sale of an estate, equity considers the vendor as a trustee for the purchaser, and the purchaser as a trustee of the purchase money for the vendor. The death of the vendor before the conveyance is immaterial, and if he die before payment of the purchase money it will go to his executors and form part of his assets.

There are some points as to probate duty which we think clear.

First. The property to be valued, in order to fix the amount of probate duty is, not the value of all the assets

(a) 5 Moo. P. C. 490.

(b) 18 L. J., Q. B. 201.

which the executors may ultimately administer, by virtue of the will, but the value of such part only, as, at the death of the testator, was, before the late alteration in the law, within the jurisdiction of the spiritual judge by whom the probate was granted. This is settled by *The Attorney General v. Dimond* (a), and *The Attorney General v. Hope*, in the House of Lords (b). Upon this principle it was held, in the former case, that French Rentes, and, in the latter, that American United States Stock, were not subject to probate duty, being locally situate out of the jurisdiction of the English Ordinary. But the executor is the owner of all the personal estate of the testator, and the probate is essential to authenticate and prove his right.


Secondly. We think that, to entitle the Crown to probate duty, the estate or effects must be of some definite value. This arises upon the construction of the statute. They must be above the value of 20*l.* to be liable to probate duty at all; and there may be many choses in action, in respect of which the probate is granted, and which would have belonged to the Ordinary, but which nevertheless are, in our opinion, not subject to probate duty, because they are incapable of definite valuation.


Now, assuming that the contract could be sued upon by the executor at law, and that this was his only remedy, we are of opinion that its value would not be subject to probate duty.

The chose in action of damages in an action at law, for a breach of such a contract, might, as has already been observed, be of merely nominal value, and, in very many cases, would really be so. No one could make an affidavit of the value of such a species of property; it is a thing incapable of valuation; a conjecture might be formed as to what damages a jury might give, but it would be mere

(a) 1 C. &amp; J. 356.

(b) 1 C. M. &amp; R. 530.

1859.  
  
 ATTORNEY  
 GENERAL  
 v.  
 BRUNNING.

1859.  
  
 ATTORNEY  
 GENERAL  
 v.  
 BRUNNING.

conjecture, and nothing more. It might as well be contended that, upon the death of a husband caused by alleged negligence, the widow, when taking out probate, should include in her valuation the damages which she might hope to recover in an action against the party causing the death. In *Moses v. Crafter* (a), Lord *Tenterden* held that the executor need not even include bad debts in the valuation.

In equity, however, the executor is deemed entitled to the purchase money. The heir is bound to convey the estate in pursuance of the contract of his ancestor: the vendee is bound to pay the purchase money, and is entitled to a conveyance of the estate. "When an estate is contracted to be sold, it is in equity considered, as converted into personalty, from the time of the contract:" Sugden's *Vendors*, ch. 4, par. 39. In the same paragraph this is called "a notional conversion," and elsewhere "a conversion out and out." No doubt it does seem extraordinary that, when an executor is entitled to a sum of money in solido (the same as in the case of an ordinary legal debt), when the money is to be treated, and dealt with as assets, and when in order to recover it he must of necessity obtain probate, that nevertheless this money is not estate and effects of the testator in respect of which the probate is granted. But it is contended on the part of the defendant that this is so, and the authorities relied on are the cases of *Matson v. Swift* (b) and *Custance v. Bradshaw* (c). In *Matson v. Swift* (b) A. B. had conveyed a freehold estate in trust to sell, and raise money, and thereout to pay certain liabilities, and as to the residue of the trust money so to be raised, to pay the same unto A. B., his executors, &c., without any claim of equity therein, by, or in favour of his heir, or real representative,

(a) 4 C. & P. 524.

(b) 8 Beav. 368.

(c) 4 Hare, 315.

notwithstanding that the estate might remain unconverted at the time of his death. Before any part of the estate was sold, A. B. died, having made a will, and appointed an executor; it was afterwards sold, and there was a large residue which was treated as personalty in the administration of the assets. The Crown claimed probate duty in respect of this residue. Lord *Langdale* was of opinion that it was not subject to it, and for the reason, that it was not property to which the Ordinary would have been entitled; and he puts the case of a valid contract for the sale of land, and the death of the vendor before the conveyance, as an instance to illustrate his view. His judgment in substance is this:— That Courts of equity, in saying that the owner has impressed upon real estate the character of personalty, or has converted “out and out,” realty into personalty, uses mere figurative language, and that which is meant is, that for purposes plainly contemplated by the owner, and to give effect to the rights he expressly, or by implication, meant to confer, the Court will declare, or impute trusts, and in the execution of them, will distribute the property, as if it were personalty: that Courts of equity have jurisdiction to consider the person in whom the legal estate is vested, whether trustee created by deed, or heir at law by descent, as a trustee for that purpose, *but not for any other purpose*: that there is a great difference between an actual conversion and that which in equity is called a conversion “out and out:” that the latter is applicable to a conversion which the Court has jurisdiction to make, and will make, only by enforcing equities and executing trusts which it declares or imputes for the purpose of carrying into effect the intention, expressed or implied, of the owner of the land: that the interest of the deceased at the time of his death existed in the form of an equitable interest in land of inheritance, and not in the form of personal estate, and that the actual

1859.

ATTORNEY  
GENERALv.  
BRUNNING.

1839.  
 ~~~~~  
 ATTORNEY  
 GENERAL  
 v.  
 BACCHING.

conversion not having been made until after the testator's death, the Crown was not entitled to any benefit from it.

Applying the *ratio decidendi* of this judgment, to the present case, it is entirely in favour of the defendant. The purchase money is no debt at law. The Ordinary would have had no interest in it; it is a mere equitable right, and is a trust for the parties whom the testator intended it should benefit. No trust was ever intended to be created for the Crown; and according to this case no such trust will be imputed or implied. If this view be correct, the principle of *The Attorney General v. Diamond*, and *The Attorney General v. Hope* directly applies, and establishes that probate duty is not payable.

The case of *Cassidy v. Bradshaw* is to the same effect. The question there was, whether freehold property belonging to a trading partnership was subject to probate duty. The Vice Chancellor's judgment was, that, so long as the freehold interest remains vested in the testator, his right to the conversion of it into personality is an equitable right, in respect of which the Ordinary had no jurisdiction: and that although those who claim under the testator are bound to take the property, with any character he may have imposed upon it, this will not alter the real nature of his interest in it, at the moment of his death, for legal purposes. The result therefore seems to be, that the interest of the executor in a contract by the testator for the sale of freehold land, not conveyed at the time of death, is not subject to probate duty.

But there is a test which seems to be conclusive, viz.: is the purchase money of a freehold estate contracted to be sold, but not conveyed at the death of the testator, legal or equitable assets? If the legal assets, it may be retained at law: it is liable to the debts of the testator in the common law Courts, and would have been liable to creditors in the

now abolished spiritual Courts, as being within the jurisdiction of the Ordinary. But, on the other hand, if it be equitable assets, it is subject to the jurisdiction of the Courts of equity alone; neither the common law Courts nor the spiritual Courts ever had any control over it. And then, according to *The Attorney General v. Hope* (a), it is not subject to probate duty. Now it is settled law that the proceeds of the sale of real property are equitable, and not legal, assets: Williams on Executors, 1322, *Barker v. May* (b). In our opinion, therefore, the defendant is entitled to our judgment.

Judgment for the defendant.

(a) 1 C. M. & R. 530.

(b) 9 B. & C. 489.

WEBB v. ROSS.

Jan. 21.

**DECLARATION.**—For that before this suit the defendant broke and entered a certain outhouse and premises of the plaintiff situate at Wordsley, in the county of Stafford, to wit, a stable of the plaintiff, and broke and injured the door and locks, and other portions of the same, and took and carried away therefrom and converted to his own use a certain horse of the plaintiff's.

**Plea (inter alia).**—As to the breaking and entering of the said outhouse and premises, and breaking and injuring the doors and locks, and the said other portions of the same, the defendant saith that before and at the time when, &c., a certain horse of the defendant, of great value, to wit, of the value of 50*l.*, the property of the defendant, had been and was feloniously stolen, taken and carried away; and the defendant, having good and probable cause of suspicion, and suspecting that the said horse was then concealed in the said outhouse and premises of the plaintiff, went and

In trespass for breaking and entering the plaintiff's premises, the defendant pleaded a justification under a search warrant granted by a justice of the county of Stafford. At the trial, the defendant gave in evidence a search warrant granted by a justice of the borough of Wolverhampton, acting as such, but who was also a justice of the county of Stafford:—*Held*, that the evidence did not support the plea.

1859.

ATTORNEY  
GENERAL

v.  
BRUNNING.

1859.

WEBB

v.

ROSS.

appeared before a justice of the peace for the county of Stafford, and charged and alleged before and to the said justice, that his, the defendant's, said horse had, by some person or persons unknown, been feloniously stolen; and that he, the defendant, had, as the fact was, probable cause to suspect and did suspect, that the said horse was concealed in the said outhouse and premises; and thereupon the said justice made and granted his warrant under his hand and seal, thereby authorizing and requiring a certain constable to whom the said warrant was directed, with necessary assistance, to enter as directed by the said warrant into the said outhouse and premises of the plaintiff, there to search for the said horse, and if the same should be found in the said search, to bring it and the body of the plaintiff before the said justice; and thereupon the said outhouse and premises were entered and searched by the said constable, in all respects conformably to law and the directions of the said warrant, and the defendant and others as his assistants; and because at the said time when, &c., in the said count of the declaration mentioned, the outer door of the said outhouse and premises in which, &c., being the door in the said count mentioned, was fastened and stopped by and with the said locks and said other portions of the said premises, and the plaintiff having been first peaceably and quietly requested so to do by the said constable, then refused to unfasten the same, and then hindered, obstructed and prevented the said constable from entering into the said outhouse and premises in which, &c. for the purpose aforesaid, so that without forcing and breaking open the said outer door, locks and other portions of the said premises the said constable could not at the said time when, &c. enter into the said outhouse and premises for the purpose aforesaid, therefore the said constable at the said time when, &c. and the defendant in his aid and by his com-

mand for the purpose aforesaid, and under and by virtue of the said warrant necessarily and unavoidably committed the trespasses herein attempted to be justified, doing no unnecessary damage to the plaintiff on the occasion aforesaid as they lawfully might for the cause aforesaid, which are the said several alleged trespasses in the introductory part of the plea mentioned, and whereof the plaintiff hath above in his said declaration complained against the defendant.— Issue thereon.

At the trial, before *Byles*, J., at the last Stafford Assizes, the defendant, in support of the above plea, gave in evidence the following warrant :—

“Borough of Wolverhampton, } To the constable of the  
County of Stafford. } borough of Wolverhampton,  
in the county of Stafford.

“Whereas it appears to me, one of her Majesty’s justices of the peace in and for the said borough, by the information on oath of Thomas Ross, of the borough aforesaid, in the said county, that the following goods, his property, viz. a horse, have, by some person or persons unknown, within one month last past, been feloniously stolen, taken and carried away out of a field, at the borough aforesaid, in the said county, and that he hath just cause to suspect, and doth suspect, that the said horse is concealed in the dwelling or outhouse of Samuel Webb.

“These are therefore in her Majesty’s name to authorize and require you with necessary and proper assistants to enter in the daytime into the said dwelling-house and outhouse of the said Samuel Webb, situate at Wordsley, in the county of Stafford, and there diligently to search for the said horse; and if the same shall be found upon such search, that you bring the horse so found, and also the body of the said Samuel Webb, before me or some other justice of the peace for the said borough, to be disposed and dealt

1859.

WEBB  
v.  
ROSS.

1859.

WEBB

v.  
ROSS.

with according to law. Herein fail not. Given under my hand and seal this 8th day of Feb. 1858.

“HENRY WALKER (L. S.)”

It appeared that Mr. Walker, who granted the warrant, was a justice of the peace for the borough of Wolverhampton and also for the county of Stafford; and that Wordsley was within seven miles of the borough. It was objected on the part of the plaintiff that the warrant did not support the plea. The learned Judge was of that opinion and directed a verdict for the plaintiff, reserving leave to the defendant to move to enter the verdict for him.

*Huddleston*, in last Michaelmas Term, obtained a rule nisi accordingly; against which

*Kettle* and *Phipson* now shewed cause.—The plea alleges that the warrant was granted by a justice of the county of Stafford, whereas the person who granted it, though a justice of that county, was also a justice of the borough of Wolverhampton, and in granting the warrant acted as such. The averment that the act was done in the one capacity is not supported by evidence that it was done in the other. Suppose the warrant had ordered the defendant to bring the plaintiff before a borough justice, and he had taken him before a county justice, could he have justified under that warrant? This is a fatal variance.

*Huddleston*, in support of the rule.—By the 101st section of the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, a warrant issued by a justice of any borough may be executed within any county in which the borough is situated. Therefore this warrant, though issued by a justice acting for the borough, has the same effect as if issued by a county justice. Then, the justice who granted it being also a county justice, the allegations in the plea were in substance proved. When

1859.

WEBB  
v.  
ROSS.

a justice is merely acting ministerially, he need not be described in the warrant. In Burn's Justice, tit. "Commitment for Safe Custody," s. iv., the law is thus stated:—"It is said that not only the name but the office and the authority of the magistrate ought to be shewn on the face of the warrant; this in strictness is not absolutely necessary, for his authority may be supplied by parol evidence." The law is stated in similar terms in 2 Hale's P. C. 122. Lambard's Eirenarcha, p. 87, 88, is to the same effect. In *Rex v. Goodhall* (a) the Court said:—"We are of opinion that it is not necessary that an authority to commit should appear in a warrant of commitment. In the case of *Elderton and Others*, 6 Mod. 75, it is laid down by Holt, C. J., that it need not appear in a warrant of commitment that the person who issued the warrant was a justice of the peace. In the case of *Rex v. Talbot*, Mich. 4 G. 2, the authority of what is laid down by Holt, C. J., in the case of *Elderton and Others*, was recognised; and the following distinction, which is in our opinion a very sensible one, was taken, namely, that in a conviction an authority to convict must appear, because convicting is a judicial act; but that an authority to commit need not appear in a warrant of commitment, because the issuing of such a warrant is a ministerial act." [Martin, B.—A search warrant is partly a ministerial and partly a judicial act: a warrant of commitment purports to be an act done after the justice has exercised his judicial consideration. But, however that may be, here there is clearly a variance. It is an old rule of pleading that where an act is to be done by a particular person in a particular way, and it is stated to have been done with greater particularity than was necessary, it must nevertheless be proved as alleged. This case is the same as if an act was alleged to have been done in this Court by the Lord Chief Baron,

(a) Say. 129.

1859.

WEBB

v.  
ROSS.

whereas it was in fact done by him at his house and as a private individual.]

Per CURIAM (a).—The defendant may have leave to amend the plea on payment of the costs of the trial and of this application within a week ; and then there may be a new trial, otherwise the rule must be discharged.

No amendment having been made,

Rule discharged.

(a) *Pollock, C. B., Martin, B., Watson, B., and Channell, B.*

Jan. 26.

BELLHOUSE and Another v. MELLOR and Another.

PROUDMAN and Another v. MELLOR and Another.

On the 16th of July, 1848, the defendants, who were traders, filed in the Court of Bankruptcy a petition for arrangement, praying that their persons and property might be protected from all process until further order. On the same day a Commissioner made an order which, after reciting

the petition and prayer for protection until further order, proceeded—"I hereby grant such protection, and order that the persons and property of the petitioners be protected from process until the 29th of July next," and the Commissioners also thereby appointed a meeting on the 29th July at twelve o'clock at noon, for the creditors to assent to or dissent from the proposed arrangement. About eleven o'clock in the forenoon of the 29th July, the plaintiffs took in execution the defendants' goods under a writ of fi. fa. On the 3rd of August the defendants were adjudicated bankrupts.

*Held:* First, that the order was valid within the 211th section of the Bankrupt Law Consolidation Act, 1849, which enables the Court to grant protection "*until further order*," and to renew the same from time to time.

Secondly, that the protection extended to the whole of the 29th July.

Thirdly, that the order being valid the assignees under the bankruptcy were entitled to the proceeds of the execution.

THE first of the above actions was commenced on the 4th of June last to recover 249*l.* 8*s.* 8*d.* due on a bill of exchange. On the 16th of June the defendants, who were traders, filed a petition for arrangement in the Court of Bankruptcy for the Manchester district, in the form given in Schedule A a of "The Bankrupt Law Consolidation Act, 1849," praying that their persons and property might be protected from all process until further order. On the same day the Commissioner made an order (so far as material) as follows:—

"Whereas a petition for arrangement was, on the 16th

1859.

BELLHOUSE

v.  
MELLOR.

day of June, 1858, duly presented and filed in this Honourable Court by George Mellor and James Terras, both of Ardwick, in the city of Manchester, joiners, builders, and contractors, trading in copartnership, under the style and firm of Mellor, Son & Terras, stating that the said petitioners were traders unable to meet their engagements with their creditors, and desirous of laying the state of their affairs before them under the superintendence and control of this Honourable Court, and of submitting themselves to the jurisdiction thereof under the provisions of The Bankrupt Law Consolidation Act, 1849; and setting forth the cause of their inability to meet their engagements with their creditors, and praying that their persons and property may be protected from all process until further order, I hereby grant such protection, and order that the persons and property of the said George Mellor and James Terras be protected from all process from the date hereof until the 29th day of July next. And I do hereby appoint a private sitting to be held in this Court on the said 29th day of July next at twelve of the clock at noon, at which sitting the creditors of the said George Mellor and James Terras are to prove their debts, and assent to or dissent from the proposal of the said George Mellor and James Terras for the future payment or the compromise of their debts and engagements according to the provisions of the above mentioned Act."

The plaintiffs issued a writ of fi. fa., upon a judgment obtained by them in the action, under which the defendants' goods were taken in execution about eleven o'clock in the forenoon of the 29th day of July. Thereupon the defendants took out a summons calling on the plaintiffs to shew cause why the execution should not be set aside, on the ground that the persons and property of the defendants were protected from all process by the order of the Court

1859.  
 ~~~~~  
 BELLHOUSE  
 v.  
 MELLOR.

of Bankruptcy. On the 2nd of August this summons was heard before *Erle*, J., who ordered that the goods be sold and the proceeds paid into Court, less the sheriff's poundage, and that the question be referred to the Court. On the 3rd of August the defendants were adjudicated bankrupt, upon a declaration of insolvency filed by them on the 31st of July; and assignees were appointed under the bankruptcy.

*Manisty*, in last Michaelmas Term (Nov. 4), obtained a rule calling on the plaintiffs to shew cause why the execution should not be set aside, and why the sum of 247*l.* 8*s.* 8*d.*, paid into Court by the sheriff of Lancashire, pursuant to the order of *Erle*, J., should not be paid to the defendants' assignees; and why the plaintiffs should not pay to the defendants the costs of the summons, heard before *Erle*, J., and of this application, and why the plaintiffs should not pay the amount of the sheriff's poundage.

*Mantague Smith* and *Mellish* shewed cause in the same Term (Nov. 23).—The question is whether the order of the Commissioner operated to protect the goods of the defendants against the plaintiffs' execution. It is submitted that the order is void both on principle and authority. First, the order is not in accordance with the 211th section of The Bankrupt Law Consolidation Act, 1849, since it does not grant protection *until further order*, but until a day certain. That section provides, "That any such trader unable to meet his engagements with his creditors and desirous of laying the state of his affairs before them, under the superintendence and control of the Court of Bankruptcy, and of submitting himself to the jurisdiction of the Court in manner hereinafter mentioned, may present petition to the Court, setting forth the true cause of such inability, and praying that his person and property may

1859.

BELLHOUSE

v.  
MELLOR.

protected from all process *until further order*; and the Court on such petition shall have power to grant such protection, and may renew the same from time to time, as it shall think fit," &c. The 212th section requires "That every such petition shall be in the form contained in Schedule A. to the Act annexed." The prayer in that form varies from the language of the 211th section, and merely says "Your petitioner therefore prays that his person and property may be protected from all process." This order recites the petition, which prays that the persons and property of the defendants may be protected *until further order*, but grants an absolute protection *until the 29th July next*. If such an order be valid, the most mischievous consequences might ensue; for the creditor would be prevented from taking any proceedings until after the day named, and the debtor might in the meantime make away with his property. For the purpose of enabling the Court to revoke the order, the Act gives the power to make it "until further order." In *Ex parte Bowers* (a), it was held that an order granting protection until a certain day was irregular, and afforded no protection against a summons under the 78th section of the Act. *Knight Bruce*, L. J., there said:—"Such an order may or may not be a nullity. Upon that I give no opinion except this, that if it is a nullity there is an end of all question. But, assuming it not to be a nullity, I apprehend it still to be irregular; and I apprehend that where a person proceeds *ex parte* to obtain an order for his own benefit, to the prejudice in a certain sense of his creditors, and in the absence of those creditors, he is bound to obtain an order strictly correct and regular, and if he does not he must abide the consequences." Lord *Cranworth*, L. J., said, that "had it not been for the form (A a.) in the schedule to the statute there could have

(a) 1 De Gex, M'N. &amp; G. 460.

1859.  
 {  
 BELLHOUSE  
 v.  
 MELLOR.

been no doubt of the irregularity of the order." The form of order for protection (a) prescribed by the Commissioners grants the protection until a day certain "or until further order." This is a statutory power and must be strictly pursued. The 223rd section only provides that in certain events the petition shall be dismissed; it does not enable the Commissioner to suspend the order.—Secondly, assuming the order to be good, it afforded no protection at the time the execution was levied. The protection was until the 29th July, that is during the whole of the 28th and exclusive of the 29th; therefore, the protection having expired at the time of the levy, the execution is good.

*Manisty*, in support of the rule.—The form of this order is different from that in *Ex parte Bowers*. This order recites the petition, which prays that the person and property of the petitioner may be protected from all process "until further order." The order for protection then proceeds:—"I hereby grant such protection and order that the persons and property of the petitioners be protected from process until the 29th July next." If the order, so far as it professes to grant protection until a certain day, is a nullity, then it becomes a protection according to the prayer of the petition, viz. until further order. *Ex parte Bowers* is no authority for the plaintiffs. There the question was whether an order for protection was operative so as to prevent an adjudication of bankruptcy under the 78th section; and all that the Court decided was that, the order being irregular, the adjudication was good. As to the alleged mischief which might ensue from such an order, the same objection would apply to an order in the form prescribed by the Commissioners. There is, however, in the Act abundant provision against such consequences. Under the 213th section, the

(a) Shelford's Rules in Bank. 29; Arch. Bank. Law, p. 243.

1859.

BELLHOUSE  
v.  
MELLOR.

Court may at any moment direct that the estate of the petitioner shall be possessed and received by the official assignee, or be taken possession of by the messenger of the Court. By section 223, the Court has power to adjudge the petitioner bankrupt if he is guilty of misconduct. [*Channell*, B., referred to *Ex parte Dales* (a).] By the 211th section, the Court may renew the order from time to time, and for that purpose it is more convenient that a fixed day should be named, upon which it would expire, than that at some indefinite time an application should be made to renew it. At all events the order is not a nullity but merely irregular.—Then as to the question whether the word “until” means inclusive or exclusive of the 29th of July. The principle to be derived from all the authorities is, that the subject-matter must be regarded. An order which gives until a certain day to do an Act, includes that day. Under the 5 Geo. 2, c. 30, s. 5, a bankrupt was protected from arrest during the forty-two days within which he was bound to surrender, and that was construed to include the whole of the forty-second day: *Ex parte Donlevy* (b). So, if the time for the bankrupt’s examination was enlarged, he was protected from arrest during the whole of the last day of examination: *Simpson’s Case* (c). [*Pollock*, C. B.—Where proceedings are stayed until the fifth day of term the order expires upon the fifth. *Watson*, B.—All the authorities on this subject were reviewed by Lord *Ellenborough* in his learned judgment in *Rex v. Stevens* (d).]

*Cur. adv. vult.*

(a) 2 De Gex & J. 206.

(b) 7 Ves. 316 a.

(c) Buck. 424.

(d) 5 East, 244.

1859.

BELLHOUSE

v.  
MELLOR.

## PROUDMAN v. MELLOR and Another.

The facts of this case were similar to those of the preceding case.

*Lush* and *Digby Seymour* shewed cause.—(They used arguments in substance the same as those urged in the previous case).—At all events the assignees are not entitled to have the money paid over to them. Their right depends on the validity of the adjudication in bankruptcy, and the plaintiffs ought to have an opportunity of trying that question by an action. If the bankruptcy is invalid the bankrupt is not entitled to the money, for the order protects his property, not for his own benefit, but for the benefit of his creditors.—They referred to *Allcard v. Wesson* (a) and *Lewis v. Collard* (b).

*Manisty*, in support of the rule.—The ground of the application is, that the plaintiffs in levying execution committed a wrongful act, and if they were permitted to contest the validity of the bankruptcy in an action, it would be allowing them to take advantage of their own wrong. The levy was an abuse of the process of the Court, and the proper remedy is by application to the Court.

*Cur. adv. vult.*

---

The judgment of the Court in the above cases was now delivered by

WATSON, B.—In each of these cases a rule had been obtained calling on the respective plaintiffs to shew cause

(a) 7 Exch. 753. In error, 8 Exch. 260. (b) 14 C. B. 208.

why the executions should not be set aside, and the sum paid into Court by the sheriff of Lancashire under these writs should not be paid out to the assignees of the defendants (who had become bankrupts), with the costs of an order made by *Erle*, J., and of this application and the sheriff's poundage. In last term Mr. *Montague Smith* and Mr. *Mellish* shewed cause in the first case, Mr. *Lush* and Mr. *Digby Seymour* in the second case: Mr. *Manisty* was heard in support of both rules.

It appeared that a petition for arrangement was filed by the defendants at the Court of Bankruptcy at Manchester on the 16th June, 1858, containing all the necessary requisites, and praying that their persons and property *might be protected from all process until further order*. Thereupon by an order of the Commissioner, dated the same 16th day of June, 1858, after reciting at length the petition and the prayer "*for protection until further order*," proceeded: "*I hereby grant such protection, and order that the persons and property of the petitioners be protected from process until the 29th July next*;" and the Court also thereby appointed a meeting on the 29th July, at twelve o'clock, for the creditors to assent or dissent from such proposed arrangement.

The plaintiffs respectively issued writs of *fi. fa.* against the defendants' goods, which were executed by seizure at 11 A.M. on the 29th July. Subsequently an order was made by *Erle*, J., that the sheriff of Lancashire should pay into Court the proceeds of the levy to abide the order of the Court. Proceedings in bankruptcy were taken against the defendants, under which assignees were appointed.

It was contended, on the part of the plaintiffs, first, that the order for protection was void as not being in compliance with the provision of s. 211 of the Bankrupt Act, 12 & 13 Vict. c. 106, and consequently they had a right to issue

1859.  
 BELLHOUSE  
 v.  
 MELLOR.  
 PROUDMAN  
 v.  
 MELLOR.

1859.  
 ~~~~~  
 BELLHOUSE  
 v.  
 MELLOR.  
 PROUDMAN  
 v.  
 MELLOR.

execution notwithstanding the above order for protection. That section provides that on a petition like the present the Court “shall have power to grant such protection (viz. till further order) and may renew the same from time to time as it shall think fit;” and it was contended that this order was for protection for a time certain, viz., till the 29th July, whereas it ought to be for protection until further order; and, as the period was limited, the order was void. The case of *Ex parte Bowers* (a) was cited, where a somewhat similar question arose before the Lords Justices. There it was held too doubtful for the Court to set aside proceedings in bankruptcy taken on the assumption that the order was void; the Lords Justices intimating that the order, if not void, was irregular and questionable. No doubt there is some difficulty in the proper construction of the statute, for it empowers the Bankruptcy Court to give protection till further order. It is difficult to see how the time can be enlarged from time to time unless some time be given for the time to expire. We think that this order is good, for it grants *such protection* as prayed, that is till further order, and also until the 29th July; and this will satisfy the power given by the Act, and distinguishes the case from *Ex parte Bowers*. Indeed this seems to be the only mode in which the Act can be complied with; and the order is in accordance with the form possessed by the Commissioners: See Shelford’s Bankruptcy, pp. 423. 591.

The plaintiffs contended, secondly, that the writ and execution under it were good, as the protection was given “until” the 29th July, which expired on the 28th July, and consequently it was executed after the protection had expired. The word “*until*” is ambiguous, and may be construed either inclusive or exclusive of the day mentioned,

(a) 1 De Gex, M’N. & G. 460.

according to the subject-matter and the true intent of the document in which it is used. (See *Rex v. Stevens*, 5 East). In this order there can be no doubt it includes the whole of the 29th of July, for it appoints twelve o'clock of that day as the day of meeting of the creditors and the petitioners, and no doubt the Court intended that until after meeting the protection should extend. For these reasons, we think the executions were in contravention of the order of protection.

It was suggested that the Court should not make this order, as the bankruptcy might be void and the plaintiffs should have an opportunity to contest its validity in an action. We think that this is no objection to the rule, for, whether the bankruptcy be bad or good, the plaintiffs cannot be entitled to the proceeds of the execution. For if the bankruptcy be good the assignees are entitled, and if set aside the defendants would have a right to this money; and, as there is no suggestion that the bankruptcy is invalid, we must enforce the rights of assignees by rule, and the rules in the term prayed must be absolute.

Rules absolute.

---

HOLBERT *v.* STARKEY.

Jan. 19.

**T**HIS was an action of debt in which the plaintiff had recovered 24*l.* for debt and 14*l.* 18*s.* for costs. The plaintiff agreed with the defendant that on his paying 5*l.* down, and 5*l.* on the first of every month from the 1st of October, 1858, no execution should be put in force until some de-

After judgment had been recovered for a debt exceeding 20*l.*, the defendant paid certain instalments to the plaintiff, which reduced the

amount due under the judgment to 18*l.* 18*s.* — *Held*, that, notwithstanding the 7 & 8 Vict. c. 96, s. 57, the defendant might be taken in execution to satisfy such sum.

1859.

BELLHOUSE  
*v.*  
MELLOR.  
PROUDMAN  
*v.*  
MELLOR.

1859.  
 HOLBERT  
 v.  
 STARKEY.

fault in such payment. In pursuance of the agreement the defendant paid to the plaintiff several instalments, amounting to 20*l.*, but failed to make the payment due on the 1st of January, 1859. The defendant was then arrested on a ca. sa. to satisfy the sum of 18*l.* 18*s.*, being the balance remaining due on the judgment.

*C. E. Pollock* now moved for a rule to shew cause why the defendant should not be discharged out of the custody of the sheriff.—The 7 & 8 Vict. c. 96, s. 57, enacts that “from and after the passing of that Act no person shall be taken or charged in execution upon any judgment, &c. in any action wherein the sum recovered shall not exceed 20*l.*, exclusive of the costs recovered by such judgment.” The substantial intention was that no person should be taken in execution for a debt under 20*l.*—He referred to *Johnson v. Harris* (a).

POLLOCK, C. B.—There will be no rule. The statute does not apply where judgment has been recovered for a debt exceeding 20*l.*, which is afterwards reduced by payments or otherwise to a sum below 20*l.*

MARTIN, B., WATSON, B., and CHANNELL, B., concurred.

Rule refused (b).

(a) 15 C. B. 357.

(b) See *West v. Farlar*, 28 L. J., Q. B. 81.

1859.

THE BLACKPOOL LOCAL BOARD OF HEALTH v. BENNETT.

Jan. 21.

SAME v. KENYON.

THE above were cases stated for the opinion of the Court of Exchequer under the 20 & 21 Vict. c. 43. The first of these cases was in substance as follows:—

Blackpool is a watering place in the township of Layton with Warbrick in the county of Lancaster.

By order in council, made 23rd October, 1851, "The Public Health Act, 1848," except section 50 thereof, was applied to the entire area, places, and parts of places comprised within the boundaries of the township of Layton with Warbrick, in the county of Lancaster; and such area, places, and parts of places were constituted a district for the purposes of "The Public Health Act, 1848."

On the 15th December, 1851, the nine persons appointed members of the Local Board of Health of the said district held their first meeting. On the 14th of June, 1853, the Blackpool Improvement Act became law. The Public Health Act, 1848, and the Town Police Clauses Act were incorporated therewith. In October, 1853, at a meeting of the above named Local Board, certain bye-laws were made

By an order in council, the entire area, places, and parts of places comprised within the boundaries of the township of L. were constituted a "district," for the purposes of "The Public Health Act, 1848." The Blackpool Improvement Act, 1853, s. 48, empowered the Local Board from time to time to make bye-laws for (amongst other purposes) regulating the conduct of the drivers of hackney carriages, animals, &c., plying within the district, and for fixing the

stands of such hackney carriages and animals. The Local Board made the following bye-law:— "That the several places in the district where painted boards shall from time to time be placed by the said Local Board to distinguish them as stands, shall be the stands for such number of carriages, horses, asses and mules, &c., as shall be mentioned on such boards; and no driver of any such carriage, &c., shall place the same on any other than some one of such stands, or shall ply for hire in any of the streets or places within the said district (except on one of such stands) under a penalty not exceeding 40s. A licenced driver was convicted of "plying for hire" off a stand. On appeal, the justices stated that it was proved to their satisfaction that the appellant was driving a licensed carriage on the beach within the district: that he got off and spoke to some people and took them up, having then passed a stand.

*Held*:—First, that the bye-law was valid, although it did not on the face of it specify the exact localities where the stands were to be.

Secondly.—That the sea shore between high and low water mark was within the district.

Thirdly.—That the appellant was properly convicted of "plying for hire" off a stand.

On appeal, under the 20 & 21 Vict. c. 43, the respondent is entitled to begin.

1859.  
  
 BLACKPOOL  
 BOARD  
 OF  
 HEALTH  
 v.  
 BENNETT.

and passed under the seal of the Local Board and signed by five members of the Board; and on the 10th of the same month were allowed by the Secretary of State. The following are the 5th and 7th of the said bye-laws:—

“Fifth.—That the several places in the district, where painted boards shall, from time to time, be placed by the said Local Board of Health to distinguish them as stands, shall be the stands for such number of carriages, sedan chairs, horses, asses and mules, as shall be mentioned on such boards; and no driver of, or person attending, any such carriage, sedan chair, horse, ass or mule, shall place the same on any other than some one of such stands; or shall take his station on any stand already occupied by the number assigned to such stand; or shall ply for hire in any of the streets, lanes, or places within the said district (except on one of such stands, or in the railway station), under the penalty for every such offence of any sum not exceeding 40s.”

“Seventh.—That the driver of any such carriage or animal, or attendant on any sedan chair, having set down a fare, shall forthwith take his place upon the next unoccupied stand to the place where he has so set down, on penalty of forfeiting any sum not exceeding 40s.”

In pursuance of the fifth bye-law, several stands have been appointed within the district, by the Local Board of Health.

On the 19th day of June, 1858, at the Petty Sessions at Blackpool aforesaid, Thomas Bennett appeared before us, the said justices, in obedience to, and to take his trial on a summons charging him with a violation of the said bye-laws; and at the hearing of the said summons, it was proved, to our satisfaction, that on the 27th day of May last, the said Thomas Bennett, being a licensed driver, was driving a licensed carriage on the South Beach within the

district : he got off the carriage and spoke to some people : he took them up. A witness spoke to him and told him he was doing wrong. It was near Duke's Hotel within the district : he had then passed the stand (being a stand within the district) about a hundred yards. The defence of the said Thomas Bennett was that he did not ply for hire, but was asked to be engaged, and that he did not get off the carriage until the gentleman had engaged him : he admitted having passed the said stand before he took up the said fare. The defendant also contended that he had a right to pass a stand and then take up a fare, and that we, the said justices, had no jurisdiction ; and that the said bye-laws were contrary to law and not binding ; and that passing a stand and taking up a fare were not offences. That he had a right to do what was proved, and that he was not guilty of any offence. We considered that the facts of the driver having passed a stand and taken up a fare, were fully proved, and we convicted him in a penalty of 5s. and costs. The grounds of our determination were, that the said bye-laws were valid ; that the said Thomas Bennett did not, as required by the bye-laws, take his place upon the unoccupied stand which he had passed ; and that having solicited for and taken up his fare at a place not a stand or railway station, the said Thomas Bennett had been guilty of a violation of the 5th and 7th bye-laws.

*Milward*, for the respondents, claimed the right to begin.—He stated that the practice adopted in the Court of Queen's Bench was that the party in support of the conviction began.

*Wheeler*, for the appellants, admitted that such was the practice in the Court of Queen's Bench, but this Court had laid down that in cases of appeal the appellant had a right to begin.

1859.  
  
 BLACKPOOL  
 BOARD  
 OF  
 HEALTH  
 v.  
 BENNETT.

Per CURIAM.—We will follow the rule in the Court of Queen's Bench.

*Milward*, for the respondents (Jan. 19).—The first question is whether there was sufficient evidence to justify the magistrates in convicting the appellant. The case states that it was proved to their satisfaction that the appellant had passed a stand and taken up a fare, under circumstances which amounted to a “plying for hire.” By the 17th section of “The Blackpool Improvement Act, 1853,” (16 & 17 Vict. c. xxix.), “the Local Board may from time to time license to ply for hire within the limits of that Act, and on the beach or coasts adjoining or near thereto, such number of hackney coaches or carriages of any description, pleasure boats, &c., horses, asses and mules, as the Local Board think fit.”

By section 48, the Local Board may from time to time, make bye-laws for (amongst other purposes) “regulating the conduct of the proprietors and drivers respectively of hackney carriages, &c., plying within the district.” Also, “for fixing the stands of such hackney carriages.” The 25th section shews that “plying for hire” may be, not by word of mouth only but by acts. It provides that “if any person be found driving, *standing* or plying for hire with any carriage, &c.,” within the district for which a license has not been obtained he shall be liable to a penalty.—Secondly, it will be argued that the bye-law is bad, because it does not fix the stands for the carriages. But that is not so. Under the 115th section of “The Public Health Act, 1848,” (11 & 12 Vict. c. 63), the bye-laws made by the Local Board have no force or effect unless confirmed by one of the Secretaries of State; and a month's notice must be given of the intention to apply for their confirmation. The legislature could never have intended that every time the slightest change was made in the situa-

tion of the stands, the Local Board should submit it to one of the Secretaries of State for his confirmation.

1859.  
  
 BLACKPOOL  
 BOARD  
 OF  
 HEALTH  
 D.  
 BENNETT.

*Wheeler*, for the appellant.—The magistrates should have set out the evidence before them, so that the Court might judge whether the circumstances amounted to a “plying for hire.” [*Watson*, B.—The power given by the 6th section of the 20 & 21 Vict. c. 43 is to determine questions of law.] Upon the facts stated there was no “plying for hire.” [*Martin*, B.—There is strong evidence of “plying for hire.”] The driver could not refuse to take the fare. The 33rd section of the Blackpool Improvement Act, 1853, imposes a penalty on “any driver of a hackney carriage standing at any of the stands for hackney carriages appointed by the Local Board, *or in any street*, who refuses or neglects, without reasonable excuse, to drive such carriage to any place within the district or the distance to be appointed by the bye-laws of the Local Board.” [*Martin*, B.—There is nothing inconsistent in a man driving along a street who shall be bound to take up a fare if requested, but he shall not “ply for hire.”] The term “ply for hire” is used in the 18th bye-law which provides that no owner or driver “shall take his station on any stand, nor shall ply for hire on Sundays; provided that nothing herein contained shall prevent such owner or driver from plying for hire on Sundays, when engaged or sent for from their own respective yards, coach-houses, or stables.” At all events the bye-law is bad. By the 48th section of the Blackpool Improvement Act, 1853, one of the purposes for which the Local Board may make bye-laws, is for fixing the stands of hackney carriages. The fifth bye-law provides, that the several places in the district where painted boards shall *from time to time* be placed by the Local Board, to distinguish them as stands, shall be the stands for such number

1859.  
 BLACKPOOL  
 BOARD  
 OF  
 HEALTH  
 v.  
 BENNETT.

of carriages as shall be mentioned on the boards. But bye-law ought to fix the stands. The Local Board has authority from time to time to fix stands by merely put up boards. By the 115th section of The Public Health Act, 1848, a month's notice of intention to apply for confirmation of a bye-law must be given, so that, if the stands fixed by a bye-law are not for the public convenience, a party may oppose its confirmation. But if the Local Board can fix stands without a bye-law, that provision will become nugatory. The bye-law, being bad in part, is bad for the whole: Com. Dig. "Bye-Law" (C. 7).

*Miheard*, in reply.—Assuming that the bye-law is bad in part, it is not therefore altogether void. But the bye-law is good. By the 48th section of the Blackpool Improvement Act, 1853, the Local Board may from time to time make bye-laws, not "fixing," but "for fixing" the stand. The case finds that boards were put up in pursuance of the bye-law. The bye-law may be read as in separate parts, and if the former part be bad, the latter will stand.

The Court expressed a wish to hear the following before delivering judgment.

---

THE BLACKPOOL LOCAL BOARD OF HEALTH v. KENNEDY

Blackpool is a watering place in the township of Layton, with Warbrick, in the county of Lancaster; and is bounded on the side in question in this case by the Irish Sea.

Between mean high and low water mark is about 100 yards. At high water, during spring tides, the sea meets the sea-wall called the Hukling; and at neap tides approaches to within from 40 to 50 yards of the foot of said Hukling.

The communication from the road above the Hulking to the beach sands is by roads called Slades, from 200 to 300 yards apart from each other.

(The case then stated the order in council, as in the foregoing case (a).)

On the 15th day of December, 1851, the nine persons appointed members of the said Local Board of Heath for the said district held their first meeting.

(The case then stated, as in the foregoing case, the passing of the Blackpool Improvement Act, &c., the making of bye-laws, and it set out the fifth bye-law (b). )

In pursuance of this fifth bye-law, seven stands between high and low water mark have for the last two years been appointed by the Local Board as stands on the beach sands, containing altogether standing for one hundred and forty asses; and the total number of licensed asses in the district is 104.

These stands are indicated by numbered boards, having painted on each the number of asses allowed to ply at each stand.

On the 11th day of June, 1858, at the Petty Sessions at Bradford, Margaret Kenyon appeared before us, the said justices, in obedience to and to take her trial on a summons charging her with a violation of the said bye-laws. And at the hearing of the said summons, it was proved to our satisfaction that on the 28th day of May last the said Margaret Kenyon was on the said sands between high and low water mark, and was then and there the person attending certain licensed asses and plying for hire at a place between twenty and thirty yards from the Hulking and about the same distance from the nearest of the said stands, and that such place was not one of the stands aforesaid nor a railway station.

(a) *Ante*, p. 127.

(b) P. 128.

1859.  
  
 BLACKPOOL  
 BOARD  
 OF  
 HEALTH  
 v.  
 KENYON.

1859.  
  
 BLACKPOOL  
 BOARD  
 OF  
 HEALTH  
 v.  
 KESTON.

The defence by the said Margaret Kenyon was, the claim that she had a right to do what was proved; and that we, the said justices, had no jurisdiction; that she was not guilty of any offence. We did not consider the said defence to be sufficient, and we convicted her in the penalty of five shillings and costs.

*Mibrard*, for the respondents.—The place in question was within the district constituted by the order in council. The preamble of the Blackpool Improvement Act, 1853, recites the order in council constituting the places mentioned a “district.” The 9th section provides that the “Act shall be put in force within the district established by the recited order in council.” The 17th section empowers the Local Board to license to ply for hire, within the limits of that Act, and on the beach or coasts adjoining or near thereto, such number of hackney coaches or carriages of any description, pleasure boats, &c., horses, asses and mules, &c. as the Local Board think fit. The 48th section enables the Local Board to make bye-laws for regulating the conduct of the drivers of hackney carriages, animals, &c., or pleasure boats “plying within the district,” that is, the district over which their jurisdiction as to licensing extends, viz. the limits of the Act, and the beach or coasts adjoining or near thereto. The 81st section empowers the Local Board to license any person to carry away gravel, stone, sand or soil from the beach or shore at Blackpool. The 85th section provides for the repair of sea-walls or embankments. These provisions recognise the jurisdiction of the Local Board over the beach. The 21st bye-law regulates bathing. There is no reason why the jurisdiction of Local Boards should not extend to the beach, which is frequented during a great part of the day. Besides it might be necessary for them to make drains. In common acceptance “the district” will

include the space between high and low water mark.—He also relied on his argument in the former case as to the validity of the bye-law.

1859.  
  
 BLACKPOOL  
 BOARD  
 OF  
 HEALTH  
 v.  
 KENYON.

*Wheeler*, for the appellant.—Assuming the bye-law to be valid, it does not apply to the sands between high and low water mark. When the term “district” is used in the Blackpool Improvement Act it means the area, places and parts of places comprised within the boundaries of the township of Layton. That appears from the preamble of the Act which recites the order in council, and the 3rd section, which provides that the “Act shall be in force within the district established by the recited order in council.” By section 4, the limits of the Act with respect to hackney carriages, pleasure boats, bathing machines, sedan chairs, horses, asses, and mules comprise “that district.” In the description of the township of Layton the beach is not mentioned, but where it is intended to be included it is expressly named. Thus the 17th section uses the words “within the limits of this Act, *and on the beach or coasts* adjoining or near thereto,” treating the beach and coasts as separate and distinct from the places within the limits of the Act. By the 48th section the power to make bye-laws is limited to purposes “within the district.” [*Pollock*, C. B.—Suppose an offence is committed on the beach between high and low water mark, is the offender to go unpunished?] *Regina v. Musson* (a) decided that if parish officers claim a right to rate a person for occupying the sea shore between high and low water mark, the onus lies upon them to prove that it is within the parish, and in the absence of evidence it must be presumed that the land is extra-parochial. [*Milward* referred to the interpretation of the word “district” in the 11 & 12

(a) 27 L. J. Mag. Cas. 100.

1859.  
  
 BLACKPOOL  
 BOARD  
 OF  
 HEALTH  
 v.  
 KENYON.

Vict. c. 63, s. 2].—He also argued that the bye-law was bad.

*Milcard* replied.

MARTIN, B. (a).—We are all agreed that the only question upon which there is any doubt is, whether the fifth bye-law is valid. If we were to apply to the Act under which these cases are stated the construction contended for by Mr. *Wheeler*, we would in a great measure do away with its benefit. The Act is one of the most useful which has passed in modern times. These cases are stated by non-professional men, and we ought not to examine them as c'osely as if they were special verdicts, but construe liberally the matters stated in them. Reading them in that view, I am of opinion that there was evidence of a “plying for hire.” With respect to the question as to the validity of the bye-law, we will take time to consider.

WATSON, B.—I am of the same opinion. The statute which gives us jurisdiction requires that two things should be set forth by the case, viz. the facts and the grounds of determination. The facts are, that the appellant, a licensed driver, not being on a stand, got off the carriage he was driving and spoke to some people and took them up. The magistrates say that the grounds of their determination were that the bye-law was valid, and that the appellant did not take his place upon the unoccupied stand which he had passed, but solicited for and took up his fare at a place not a stand or railway station. We must look at the substance of the case, and in substance it is correctly stated. With respect to the question of jurisdiction, the Blackpool Improvement Act contemplated the beach as part of the

(a) *Pollock*, C. B., had left the Court

district. The object was to legislate for a rapidly increasing place, and stringent regulations were required, otherwise it would not be a place of pleasure but a nuisance. As to whether the bye-law is valid, we will take time to consider.

CHANNELL, B., concurred.

*Cur. adv. vult.*

1859.  
 BLACKPOOL  
 BOARD  
 OF  
 HEALTH  
 v.  
 BENNETT.  
 SAME  
 v.  
 KENYON.

The judgment of the Court was now delivered by

WATSON, B.—We delivered an opinion on all the points of these cases, except on the point respecting the validity of the fifth bye-law made under the 16 & 17 Vict. c. xxix., “The Blackpool Improvement Act, 1853.” The provision in that Act, under which the bye-law was made, is as follows:—“The Local Board may from time to time (subject to the restrictions of this Act) make bye-laws for all or any of the purposes following;” and amongst others there is this,—“For fixing the stands of such hackney carriages and animals as aforesaid, and the distance to which they may be compelled to take passengers, not exceeding the district.” The Local Board made a bye-law in the following terms.—(His Lordship read the fifth bye-law (a).) It was contended that the bye-law was bad, inasmuch as it did not on the face thereof specify the exact localities where the stands were to be; and that it was unreasonable and contrary to the meaning of the Act to allow the Local Board to fix the places for the stands from time to time by putting up boards. Although the old rule of law to be found in Com. Dig. “Bye-Law” (C. 7), which says that a bye-law bad in part is bad in the whole, is qualified to this

(a) *Antè*, p. 128.

1859.  
 BLACKPOOL  
 BOARD  
 OF  
 HEALTH  
 v.  
 BENNETT.  
 SAME  
 v.  
 KENYON.

extent that, if the good part is independent and unconnected with the bad, the good part would be valid and binding (*Rex v. Faversham (a)*). Our decision does not turn on that point, for the whole bye-law is so connected in the prohibition of plying off the stands with the part for fixing the stands, that they cannot be separated. We think that looking at the object of the Act in fixing stands, viz., to prevent the drivers of carriages and the leaders of horses and donkeys from being a nuisance if allowed to ply at liberty over the streets of the town; and as it may be necessary to add to or reduce the number of stands, or to alter at different seasons the places for such stands, the mode of fixing them is, in our opinion, in accordance with the powers and meaning of the Act. We think it is not unreasonable to leave such powers of fixing and altering the stands from time to time in their own body, viz., the Local Board elected by the ratepayers; for it would not be reasonable on every minute alteration of a stand that a fresh bye-law, notice, and reference to the Secretary of State should take place, which never could have been contemplated by the Act. We therefore think that the conviction in each case should be affirmed.

Convictions affirmed.

(a) 8 T. R. 352.



1859.

THE LIVERPOOL BOROUGH BANK *v.* THOMAS ECCLES,  
RICHARD ECCLES and Another.

Jan. 13.

**DECLARATION.**—The Liverpool Borough Bank being a Banking Company which, before and at the time of the passing of the Joint Stock Banking Companies Act, 1857, and thence until it was registered as hereinafter mentioned, consisted of seven or more persons, and had a capital of fixed amount and divided into shares, also of fixed amount, and which, while it was such Company as aforesaid, previously to the passing of the said Act, legally carried on the business of banking, and which was not a Company by the said Act required to be registered; and which, after the passing of the said Act, with the assent of a majority of such of its shareholders as were present in person or by proxy (proxies being allowed by the regulations of the Company), at a general meeting summoned for the purpose, registered itself as a Company other than a limited Company under and according to the said Act (*a*) by — their attorney sue Thomas Eccles, &c.: For that before the passing of the said Act, and while the said Company so legally carried on business under the provisions of an Act (7 Geo. 4, c. 46), an agreement was made between the defendants of the first part, Joseph Eccles & Co. of the second part, and the said Banking Company of the third part, reciting, as the facts were, that Joseph Eccles & Co. were indebted to the bank in 144,933*l.* on the balance of their account current, &c.,

J. E. & Co. being indebted to the plaintiffs who were bankers, the defendants by a writing expressed to be made between the plaintiffs and the defendants, in consideration of the agreement therein-after contained on behalf of the plaintiffs, agreed that they would pay all monies which then were or at any time should be due from J. E. & Co. to the plaintiffs, not exceeding 35,000*l.*, by instalments of 3000*l.* a year for five years, and two subsequent annual instalments of 10,000*l.*; and in consideration of the above the plaintiffs agreed that they would not charge more than 5 per cent. interest to

J. E. & Co.; and when all debts of J. E. & Co., except 15,000*l.*, should have been paid, would grant them a full release. This agreement was signed by the defendants and handed by them to the plaintiffs who had pressed for it. The plaintiffs had acted upon, but never executed it.—*Held*, that the agreement was binding upon the defendants notwithstanding that it had not been executed by the plaintiffs.

(*a*) See 20 & 21 Vict. c. 49, s. 6; 19 & 20 Vict. c. 47, s. 13.

1859.  
  
LIVERPOOL  
BOROUGH  
BANK  
v.  
ECCLES.

and to the defendants in the sum of 15,000*l.*: that they were unable to pay their debts in full, but that they and the defendants had proposed to the bank, and it had been agreed between them, to enter into the agreement, thereafter stated, for the liquidation of the monies which had been or might be advanced by the banking Company; in consideration of the agreement thereafter contained on behalf of the said bank, the defendants agreed that they would pay all monies which then were or at any time should be due from Joseph Eccles & Co. to the bank not exceeding 35,000*l.*; and that they should not be called upon to pay the said sum of 35,000*l.* except by the instalments following, that is to say, 3000*l.* on the 31st of December in each year, for the period of five years from the 1st of January then last elapsed, and the sum of 10,000*l.* in each of the two succeeding years, and that until the whole of the then existing and future debts of Joseph Eccles & Co. to the bank should be paid, the defendants should not claim payment of the debt of 15,000*l.*; and in the mean time should stand possessed of the said debt in trust for the bank; and in consideration of the above, the said banking Company agreed that they would not, in future, charge more than 5 per cent. upon the amount owing to them, in addition to their commission and other usual banker's charges; and, also, that they would, so soon as all debts and liabilities of Joseph Eccles & Co. had been fully paid, save and except a sum of 15,000*l.* with interest, grant them a full release, &c.—Averments: that though on the 31st of December, 1857, the sum of 18,000*l.* was due to the banking Company from Joseph Eccles & Co., and the plaintiffs had done all things, and all things had happened to entitle them to the payment of the 3000*l.* due on that day, yet the defendants had not paid, &c.

Third plea.—That the agreement was not, before the

accruing of the cause of action, or at any time since, signed, executed or otherwise agreed to, by or on behalf of the plaintiffs, or the said Joseph Eccles & Co.

1859.  
  
 LIVERPOOL  
 BOROUGH  
 BANK  
 v.  
 ECCLES.

At the trial, before *Martin*, B., at the Liverpool Summer Assizes, 1858, it was proved that after a negotiation respecting a guarantee to be given by the defendants, and repeated applications for it, the agreement declared upon, which had been prepared by Mr. Smith, the manager of the Bank, was executed by the defendants and left at the bank. The agreement concluded with an attestation clause which was as follows:—"In witness whereof the said parties have hereunto set their hands the day and year first above written." There was only one copy of the agreement. The plaintiffs had acted upon the agreement for a short time, but neither they nor Joseph Eccles & Co. had ever executed it.

The defendants' counsel objected that the agreement ought to have been signed by all the parties, being one not to be performed within a year, and therefore required by the 4th section of the Statute of Frauds to be in writing and signed.

The learned Judge directed a verdict for the plaintiffs, reserving to the defendants leave to move to enter a verdict for them, the Court to be at liberty to draw any inferences of fact.

*Edward James* having obtained a rule nisi accordingly,

*Atherton* and *Blackburn* now shewed cause.—The argument on the other side arises out of a misapprehension as to the Statute of Frauds. The statute only requires that the agreement should be signed *by the party to be charged therewith*. An agreement is good within that statute if signed by the party against whom it is to be enforced: *Laythourp v. Bryant* (a), *Champion v. Plummer* (b). It does

(a) 2 Bing. N. C. 735.

(b) 1 N. R. 254.

1859.

LIVERPOOL  
BOROUGH  
BANK  
v.  
ECCLES.

not follow, because it is expressed to be made between several parties, that it must therefore be executed by all.

*Edward James, Mellish and Baylis*, in support of the rule. —The consideration for the agreement of the defendants was the agreement of the bank. Therefore it appears upon the face of this guarantee, that it was contemplated that the bank should enter into a valid and binding agreement to release Joseph Eccles & Co. from all claims, when all debts due from them to the bank, save 15,000*l.*, should have been paid. The Statute of Frauds makes it necessary that such agreement, to be binding, should be signed by the banking Company. The instrument was not to be deemed complete; neither party was to be bound until both had signed it. *Laythoarp v. Bryant* (a) does not touch the present question, because, in that case, there was a complete parol agreement, independently of the memorandum of it. The purchaser had signed the contract without requiring any signature by the vendor; but the vendor could not have called on the purchaser to complete his purchase without himself performing his part of the agreement. Here the release by the bank is to be given at a period long subsequent to the payment of the monies by the defendants. If the plaintiffs' construction of the agreement is correct, the defendants, having performed their part of the agreement, would have no remedy to compel the execution of the release. Till it was executed by the defendants, the contract was merely an escrow. The parties stipulated for an agreement in writing—the written contract, and that alone, was to be the agreement of the parties. The case resembles that of a submission to arbitration, where neither party is bound unless both are so: *Biddell v. Douse* (b), *Payne v. Ives* (c), *Ferrer v. Oren* (d). There was no valid or avail-

(a) 2 Bing. N. C. 735.

(b) 6 B. &amp; C. 255.

(c) 3 D. &amp; R. 664.

(d) 7 R. &amp; C. 427.

able consideration. It is clear that the obligation of the defendants was intended to depend on there being a binding agreement by the bank, and not upon whether or not the bank acted upon it. [*Martin, B.—Stokes v. Cox* (a) and *Wheelton v. Hardisty* (b) shew that, if such a matter is to be made a condition precedent, the parties must make it so in distinct terms.]

1859.  
  
 LIVERPOOL  
 BOROUGH  
 BANK  
 v.  
 ECCLES.

POLLOCK, C. B.—The rule must be discharged. In *Warner v. Willington* (c), Vice Chancellor Kindersley adopts the doctrine that where there is a proposal signed by the person intended to be bound, and accepted by word of mouth, it is sufficient. If the argument had raised more doubt in our minds we should have been bound by the authorities, and it would have been necessary for the defendants to have recourse to a Court of error to alter the rule which has been laid down. So far as the case rests on the Statute of Frauds, the defendants are concluded by authority. In *Champion v. Plummer* (d), though one would have supposed that the agreement was intended to be mutual, the Court held that if a party agrees in writing duly signed to buy, the agreement of the other party to sell being by word of mouth, the party agreeing to buy is bound, though the agreement would not have been enforceable against the other. But Mr. *Mellish* put this case on a different ground. He argued that it must be inferred from the language of the document that the parties intended that there should be an agreement in writing signed by the plaintiffs. Now it is clear that it was not intended that there should be two copies of the agreement executed in duplicate. There was but one copy signed by the defendants and left at the bank. Must we

(a) 1 H. & N. 533.

(b) 8 E. & B. 232. 285.

(c) 3 Drewry, 523.

(d) 1 N. R. 254.

1859.

LIVERPOOL  
BOROUGH  
BANK  
v.  
ECCLES.

adopt the argument that the agreement was not to be deemed complete unless signed by both? There is great weight in what was thrown out by my brother *Martin*, that to make a matter a condition precedent it must be expressly so made. That cannot be predicated of an intention to have this agreement signed. Considering the two alternatives; the one that it was left with the bank to be signed and made binding, or repudiated, at the option of the bank, at any time; and the other that it was intended to be binding, but that the defendants did not care whether it was signed by the bank or not, the conclusion seems irresistible that the signature by the banking Company was not deemed essential by the defendants.

MARTIN, B.—If I were not of the same opinion I should feel myself bound by *Laythorp v. Bryant* (a). The doctrine of that case has been recently recognised in *Smith v. Neale* (b), and can only be impeached in a Court of error. The presumption is that this document, having been signed and handed to the bank, was intended to be binding. In Sheppard's Touchstone, 285, it is said "if lands be limited to a man by way of use, or granted immediately by feoffment, gift, grant, or release; or goods or chattels be given or granted to a man; in these cases the things granted shall be said to be in the parties, and the grant good, before notice and agreement, and until disagreement. The law presumes that every grant is for the benefit of the party, and therefore, until the contrary is shewn, supposes an agreement to the grant." That is the general rule. If the defendants had chosen, when the agreement was handed to Mr. Smith, to say that it should not be binding unless signed by both parties, they might have done so. But there is nothing that leads to the pre-

(a) 2 Bing. N. C. 735.

(b) 2 C. B. N. S. 67.

sumption that such was their intention. In a recent case where a promissory note, to be executed by two sureties, was signed only by one, I left it to the jury to say whether the nature of the transaction did not shew that the understanding was that the surety who executed was not to be liable unless both signed. But that is a different matter.

1859.  
 LIVERPOOL  
 BOROUGH  
 BANK  
 v.  
 ECCLES.

WATSON, B.—The question is whether we can direct the verdict to be entered for the defendants on the third plea. The agreement is not stated to have been delivered as an escrow, but as a binding agreement. It was agreed to, and the parties are bound, because it was signed by the defendants and handed to the bank to be acted upon. But it is said that, because something was to be done on the other side, the defendants are not bound unless they got a right of action on the agreement. But, as in *The Mayor of Lyme Regis v. Henley* (a), the acceptance of a grant may impose a binding obligation. If it is said that the agreement was not complete until signed by all parties, I do not know why the bank should not sign it, or be compelled to sign it now. There are several stipulations to be performed on the part of the bank, such as to give time, and not to charge more than five per cent. Therefore, according to ordinary rules, the signing of the agreement cannot be treated as a condition precedent.

CHANNELL, B.—I agree that the rule must be discharged. Suppose that the third plea had simply stated that the agreement was not signed or executed, it would have been open to demurrer, on the grounds disclosed in *Laythoarp v. Bryant* (b). The decisions, in that case and *Smith v. Neale* (c), are binding upon us. That disposes of the

(a) 1 Bing. N. C. 222.

(b) 2 Bing. N. C. 735.

(c) 2 C. B., N. S. 67.

1859.

LIVERPOOL  
BOROUGH  
BANK  
v.  
ECCLES.

question upon the Statute of Frauds. But was the guarantee "not otherwise agreed to" in fact? Mr. *Mellish* argued that the understanding was, that the instrument was not to be deemed complete until it was signed. If I agreed with him, I should think that the plea was made out. But it does not follow, because the parties anticipated that the bank would sign, that the instrument is not binding without such signature. The evidence does not support his view. The bank has acted upon the instrument, and that is enough.

Rule discharged.

Jan. 21.

THE METROPOLITAN SALOON OMNIBUS COMPANY  
(LIMITED) v. HAWKINS.

A shareholder in a Joint Stock Company is not entitled to an inspection of their books for the purpose of proving a plea of justification in an action against him for libel imputing insolvency to the Company.

THIS was an action by a Joint Stock Company, incorporated under the 19 & 20 Vict. c. 47, against a shareholder in the Company. The declaration contained a count for libel, and two counts for slander, imputing to the Company insolvency, mismanagement and an improper and dishonest carrying on of its affairs. The defendant pleaded (amongst other pleas) a justification of the libel and slanders, upon which pleas issues were joined. On the 2d December, 1858, *Martin*, B., made the following order:—

"Upon hearing counsel (a), and upon reading the affidavits, &c., I do order that Mr. Norton and his clerk only shall be at liberty, on Monday and Tuesday next, between the hours of ten in the forenoon and five o'clock in the afternoon of

(a) *Stammers*, who appeared in support of the application, cited the following cases:—*Steadman v. Arden*, 15 M. & W. 587; *Thorpe v. Macauley*, 5 Madd. 219; *Hill*

v. *Philp*, 7 Exch. 232; *Wilmot v. Maccabe*, 4 Sim. 263; *Macauley v. Shackell*, 1 Bligh. N. S. 96.

each of those days, at the office of the plaintiffs, at No. 156, Cheapside, in the city of London, to inspect, examine, and take extracts and examined copies of the minute-book, cash-book, journal and ledger of the said Company, and of any other book or books containing entries relating to the business and affairs of the said Company from the 1st June, 1857, upon payment of 6s. 8d. costs, and 4d. per folio for copy."

1859.  
 METROPO-  
 LITAN SALOON  
 OMNIBUS CO.  
 v.  
 HAWKINS.

On the 4th December, *Martin*, B., made another order, by which he ordered that the above order "be varied by directing that the inspection be had at the office of the Company, or of the plaintiff's attorney, from ten to two, for six consecutive days, commencing Monday, the 6th instant, and continuing regularly from Monday to Saturday; the costs to be 6s. 8d. per diem, and 4d. per folio for all copies or extracts made; no publication of any kind to be made of the copies or extracts, and not to be extended beyond the purposes of the cause, and exclusively confined thereto."

On the 10th December, *Channell*, B., made an order "that the time be extended so as to include the days from this day until and inclusive of the 17th instant; that the inspection begin to-morrow, and that the costs of this order be costs in the cause." The defendant, having acted under this order during several days, applied for leave to extend the time for inspection, &c., and for liberty to make certain specified extracts from the plaintiffs' books. *Channell*, B., refused to make an order, but without prejudice to the defendant's right to apply to *Martin*, B., who, upon an application to him on the 13th January, referred the parties to the Court.

*Montagu Chambers* (*Stammers* with him) now moved for a rule to further extend the time given for the inspection and taking extracts from the books of the Company; and

1859.  
 METROPO-  
 LITAN SALOON  
 OMNIBUS CO.  
 v.  
 HAWKINS.

particularly that the defendant's attorney and his clerk should be at liberty to take the following extracts, viz., from the minute-book of the Company the entries as to certain bills of exchange and a certain promissory note, and as to certain transfers of shares in the Company; and also a copy of a certain letter; and also from the ledger of the Company certain specified accounts; and in the journal of the Company certain leaves gummed over and fastened down (*a*).—Under the circumstances the time for inspection ought to be extended. The right to inspect may be maintained either at common law or under the 14 & 15 Vict. c. 99, s. 6. The original order was made on the authority of *Macauley v. Shackell* (*b*). [*Pollock*, C. B.—That case only decided that a defendant in an action for libel is entitled to a commission to examine witnesses who are abroad. It is no authority that he is entitled to a discovery. *Martin*, B.—If a person publishes a libel imputing insolvency to a mercantile house, and then pleads a justification to an action, I do not think that he ought to be allowed to go to their office and ransack their books in order to prove his plea.] The defendant is a shareholder in the Company, and as such is entitled to an inspection of their books. [*Martin*, B.—This is not an application by the defendant in his character of shareholder. A shareholder has certain rights of which he can avail himself in the Court of Queen's Bench.] In an action by an allottee of railway shares against a member of the provisional committee, to recover back his deposit, this Court ordered that the plaintiff should have an inspection and copy of the subscribers' agreement and parliamentary contract, which both the plaintiff and de-

(*a*) The application was made on affidavits of the defendant and his attorney and his clerk, that the further time for the above inspection was material for the

defence to the action, and that the application was not made with a view to harass or annoy the plaintiffs.

(*b*) 1 Bligh. N. S. 96.

defendant had signed, and which were in the hands of the solicitors of the Company; the plaintiff's affidavit stating that an inspection of them was necessary to him for the purpose of framing his case, and the defendant not shewing that they were not within his power or control: *Steadman v. Arden* (a). Alderson, B., there said:—"It does not depend at all on the nature of the action; all that is material is, that both parties have an interest in the documents, and that an inspection of them is material to the prosecution of the action." [Martin, B.—You must add to what Alderson, B., said, "that the party holding the document must in some sense be a trustee for the applicant."] That is so in this case, for the defendant has a distinct interest in the documents, as a shareholder. In *Shackell v. Macauley* (b), which was an action for libel, the Court of Chancery granted a discovery, and on appeal (c) the House of Lords held that the Court of Chancery was right in that respect, but doubted whether the defendant was bound to answer interrogatories tending to criminate himself. The original order allowed the defendant four hours a day for six days, and in consequence of the difficulties thrown in his way Channell, B., granted six days further time. The plaintiffs have disobeyed this order, and have refused to allow the defendant to take extracts from the minute-book.

1859.  
  
 METROPO-  
 LITAN SALOON  
 OMNIBUS CO.  
 v.  
 HAWKINS.


POLLOCK, C. B.—I am of opinion that there ought to be no rule. If the defendant had made the order of the learned Judge a rule of Court, and had then applied for an attachment for disobedience of it, it would have been necessary to set aside the rule before we could entertain the question as to the validity of the order. That is not now necessary, and we may consider the effect of the order,

(a) 15 M. & W. 586.

(b) 2 Russ. 550, note.

(c) 1 Bligh. N. S. 96.

1859.

  
 METROPO-  
 LITAN SALOON  
 OMNIBUS CO.  
 v.  
 HAWKINS

as if an application had been made to rescind it. I think that there ought to be no rule, not because the defendant has had sufficient time to inspect the plaintiffs' books—for assigning that reason would be approving of the order; but because the order ought never to have been made. I believe my brother *Martin* is now satisfied that he ought not to have made it. We cannot notice the defendant otherwise than as a person defending an action for libel—not as a partner or shareholder; and we ought to refuse him assistance just as we should refuse any other defendant who libelled a merchant by saying he was insolvent, and then asked for an inspection of his books in order to prove it. A merchant, who is libelled by a statement that he is insolvent, has a right to maintain an action; and the defendant has no right to say: “let me examine all his affairs, for if you do I have some chance of proving that he is insolvent.” The case of *Macaulay v. Shackell* (a) merely decided that, if a libel relates to transactions which occurred abroad, the defendant is entitled to a commission for the examination of witnesses at the place where the events happened; just as, if they had happened here, he might have called witnesses to prove them. A person who ventures to publish a libel, or utter slander, should be in a condition to justify his conduct, and not come to the Court to ask for assistance to get up some proof. If the defendant has acted in a fair spirit, and with a view to the interest of the Company of which he is a member, that would afford a defence under the general issue; but if the publication of the libellous matter is not justified by the circumstances, the defendant must fail in his special plea.

MARTIN, B.—I am of the same opinion. It is clear that the defendant cannot bring himself within the Act 14 & 15

(a) 1 Bligh. N. S. 96.

Vict. c. 99, s. 6; and if he has any right as a shareholder he must apply to the Court of Queen's Bench for a mandamus. In this case the defendant must be considered as any other person defending an action for libel. Looking at the case of *Macauley v. Shackell* (a), although it is difficult to collect from it any distinct proposition as to the right of a defendant in an action for libel, I am not prepared to say, that, in no case, would he be entitled to an inspection; but he would be bound to give the tribunal to which he applied, reason to believe that there was some particular document, which he could specify and put his hands upon, which would support his case; and neither a Court of law, or equity, would give him an opportunity of searching the plaintiffs' books, in order to get up a defence. We grant an inspection of such documents as the defendant gives the Court reasonable ground to believe are necessary for his defence. I made the order on the authority of *Macauley v. Shackell*; but, after the books had been examined, I was startled at the circumstance that the defendant desired to search other books in order to establish the insolvency of the Company. If a person thinks fit to publish a libel upon a merchant, that he should have a right, on pleading a justification, to go to the merchant's counting-house, have all his books brought down and submitted to him, and thus get information as to all his affairs, seems to me so repugnant to every idea of right, that it would require the strongest possible ground to induce any Court to accede to such an application. I am disposed to agree with the Lord Chief Baron, that a person who publishes a libel ought to be prepared to prove it.


WATSON, B.—I am of the same opinion. My judgment proceeds upon this ground, that an inspection has already

(a) 1 Bligh. N. S. 96.

1859.

METROPO-  
LITAN SALOON  
OMNIBUS CO.  
v.  
HAWKINS.

1859.

  
 METROPOLITAN  
 LIYAS SALOON  
 ORNATE CO.  
 v.  
 HAWKINS.

been granted, and the defendant has obtained all that he could reasonably ask for. I agree with the Lord Chief Baron and my brother *Martin*, as to the effect of the case of *Macaulay v. Shackell*. There the mere fact of the action being for libel, did not prevent the party from having a discovery, but the House of Lords never meant to say, that, in every case of an action for libel, the defendant is entitled to a discovery. It is a monstrous proposition, that, if a person chooses to libel any mercantile firm, large or small, and then pleads a justification to an action, he has a right to inspect and take extracts from every book or document they possess. As to the defendant being a shareholder, or partner in the Company, if he required an inspection in that character, there is a mode of obtaining it; but I have yet to learn that, if one shareholder, or partner, chooses to libel the others, he has, therefore, a right to inspect the partnership books. In the case of an action on a contract, where documents are the joint property of both parties, one may have an inspection, because the other holds them as trustee for him; but to extend that to actions for libel, would be to pervert the rules of justice, by allowing a person to libel another and then get up facts to justify it.

CHANNELL, B.—I am also of opinion that this application should be refused. When the case was before me at Chambers, I entertained some doubt whether the order for inspection was properly made, but I cannot help thinking that the defendant has had sufficient time for inspection.

Rule refused.



1859.

## ELIZABETH BIBBY v. CARTER.

Jan. 19.

**T**HE first count of the declaration stated that, before and at the time of the committing of the grievances hereinafter in this and the second and third counts mentioned, a messuage and land with the appurtenances, were in the respective occupations of certain persons as tenants thereof, to the plaintiff, the reversion thereof then, and still, belonging to the plaintiff: Yet the defendant wrongfully dug and made divers excavations in the said land under, or near to the said messuage, without sufficiently shoring, propping, underpinning, or otherwise protecting the said messuage from and against the effects thereof, whereby the said land and the said messuage sank, and swagged, and was damaged and injured, &c.—Second count: that the said messuage and land, before and at the time of the committing of the grievances in this count mentioned, in fact received lateral support from, and were supported by the land adjoining the said messuage and land: Yet the defendant wrongfully and negligently dug, and made divers excavations in the said land so adjoining the said messuage and land, and without sufficiently shoring, propping, underpinning, or otherwise protecting the said messuage and land, in this count first mentioned, from and against the effects thereof, and thereby deprived the said messuage and land of its said support: whereby injury, like that in the first count mentioned, was done to the said messuage and land in which the plaintiff

The second count of a declaration stated that a messuage and land, the reversion whereof belonged to the plaintiff, were in fact supported by the land adjoining: yet the defendant wrongfully and negligently dug and made divers excavations in the land adjoining without sufficiently shoring the said messuage and land, and thereby deprived them of their support, whereby they sank and were injured.—The third count stated that the plaintiff, by reason of her said interest in the messuage and land, was entitled to have the messuage supported laterally by certain land adjoining: yet the defendant wrongfully and negligently dug and made divers excava-

tions in the land adjoining without sufficiently shoring the said messuage and land, and thereby deprived the messuage of the support to which the plaintiff was so entitled, whereby the messuage and land sank and were injured.—*Held*, that the second count was good, although it did not allege any right to support, for as it did not appear that the defendant was the owner of the adjoining land, he must be taken to be a stranger and a wrong-doer.

*Held*, also, that the third count was good.

1859.

BIBBY  
v.  
CARTER.

was so interested, and the plaintiff was injured in her said reversionary estate.—Third count: that before and at the time of the committing of the grievances in this count mentioned, the plaintiff was by reason of her said interest in the said messuage and land, with the appurtenances, entitled to have the said messuage supported laterally by certain land adjoining the said messuage and land: Yet the defendant wrongfully and negligently dug, and made divers excavations in the said land adjoining the said messuage and land, and without sufficiently shoring, propping, underpinning, or otherwise protecting the said messuage and land in the first count mentioned from and against the effects thereof, and thereby deprived the said messuage of the support to which the plaintiff was so entitled as aforesaid: whereby injury like that in the first count mentioned was done to the said messuage and land, and the plaintiff was injured in her said reversionary estate.

Demurrer to second and third counts, so far as they relate to wrongs done to, and in respect of the said messuage.—Joinder therein.

*Milward*, in support of the demurrer.—The second count is bad. It merely states that the plaintiff's messuage and land were in fact supported by the land adjoining; but it does not allege any right to such support. It may be that the plaintiff holds the surface with only a qualified right, as in the case of *Rowbotham v. Wilson* (a). In *Peyton v. The Mayor of London* (b) the declaration was held bad, because it did not allege that the plaintiffs were entitled to have their house supported by the defendant's house, and did not contain any allegation from which a title to such support could be inferred as a matter of law. *Gayford v. Nicholls* (c)

(a) 6 E. & B. 593. In error,  
8 E. & B. 123.

(b) 9 B. & C. 725.  
(c) 9 Exch. 702.

is an authority that, unless a right to support be acquired, the owner of the soil can maintain no action against his neighbour who causes damage by the proper exercise of his right. [*Channell*, B., referred to *Dodd v. Holme* (a).] There it was alleged and proved that the defendant so negligently, unskilfully, and improperly dug his own soil that the plaintiff's house was thereby injured; and although it was shewn that the house was infirm, and could only have stood a few months, the Court said that the defendant had no right to accelerate its fall. [*Martin*, B., referred to *Partridge v. Scott* (b).] That decision, with others, is reviewed in *Humphries v. Brogden* (c). In *Chadwick v. Trower* (d), it was held that the mere circumstance of juxta-position does not render it necessary for a person, who pulls down his wall, to give notice of his intention to the owner of an adjoining wall which rests upon it.—The third count is also bad. It states that the plaintiff, by reason of her reversionary interest, was entitled to have the messuage supported laterally, by the adjoining land. But the mere ownership of the reversion does not entitle a reversioner to support for his messuage.

*Brett*, contra.—The second count is good. First, there is no allegation that the defendant was the owner of the adjoining land; he must therefore be taken to be a mere stranger depriving the plaintiff of the actual support of her messuage and land. *Jeffries v. Williams* (e) is an authority in point. There the declaration stated that certain messuages and closes were in the occupation of the tenants of the plaintiff, the reversion thereof belonging to them; and that the defendant so wrongfully, carelessly, negligently, and improperly, and without leaving any proper or sufficient

1859.  
  
 BIBBY  
 v.  
 CARTER.

(a) 1 A. &amp; E. 4.39

(b) 3 M. &amp; W. 220.

(c) 12 Q. B. 739. 750.

(d) 6 Bing. N. C. 1.

(e) 5 Exch. 792.

1859.  
 {  
 BIBBY  
 v.  
 CARTER.

support, worked certain mines, and dug and got the minerals out of the mines near to the said messuages and closes, whereby the foundations of the messuages were injured, and in consequence thereof large portions of the buildings fell down. On motion in arrest of judgment, it was held that the declaration was good, although it contained no averment that the plaintiff had a right to have the messuages supported by the soil under which the defendant got the mines; for as it was neither alleged, nor could be inferred, that the soil in which the mines were, was the defendant's, or that the defendant had all the right to get the mines, which the owner of the adjoining soil had, the defendant was *primâ facie* a wrong-doer; and therefore, as against him, the declaration disclosed a sufficient title. In this case, if the defendant relies on the circumstance of his being the owner of the adjoining land, he should have pleaded that fact. Secondly, assuming that the defendant is not owner of the adjoining land, the count alleges that he *negligently* dug and made the excavations; therefore *à fortiori* it is good, for it charges negligence by a stranger. *Trower v. Chadwick* (a) shews that is a good ground of action that, by reason of negligence and carelessness in the exercise of the defendant's rights, the plaintiff's rights were injured. The same doctrine was laid down in *Dodd v. Holme* (b) and *Vaughan v. Menlove* (c). *Wyatt v. Harrison* (d) in effect supports this proposition, for there the allegation in the count which was demurred to was, not that the defendant dug *negligently*, but that he dug *so near* to the plaintiff's house that it gave way. [*Martin, B.*—I never could understand that case. I should have considered the digging "negligently and so near the plaintiff's house" as being one and the same act.] The authorities

(a) 3 Bing. N. C. 334. In  
 error, 6 Bing. N. C. 1.  
 (b) 1 A. & E. 493.

(c) 3 Bing. N. C. 469.  
 (d) 3 B. & Adol. 871.

relied on only shew that the adjacent owner may have a right to support for the natural soil, but not if he puts a house upon it. Here the maxim applies, “sic utere tuo ut alienum non lædas.” The third count is good, for the same reasons.

1859.  
BIBBY  
v.  
CARTER.

*Milward*, in reply.—The second count charges not merely a digging, but a digging without sufficient shoring; therefore it shews that the defendant was the owner of the land. [*Pollock*, C. B.—The point was expressly decided in *Jeffries v. Williams* (a).] This case is distinguishable, because the mode in which the wrongful act is alleged shews that the defendant was owner.

POLLOCK, C. B.—I am satisfied that the second count is good. On the authority of *Jeffries v. Williams*, the defendant must be taken to be a mere stranger, and therefore liable to an action. The third count is also good; and our judgment must be for the plaintiff.

MARTIN, B.—I am inclined to be of the same opinion. This case is another example of how much better it would be if parties would plead so as to state what they really mean.

WATSON, B.—The law has been distinctly laid down in the case of *Jeffries v. Williams*, and it would be mischievous to disturb it. We ought not to leave matters at large where there have been decided cases, but abide by them.

CHANNELL, B.—I am also of opinion that both counts are good.

Judgment for the plaintiffs.

(a) 5 Exch. 792.

1859.



Jan. 29.

LAFONE v. SMITH.

To an action for a libel in a newspaper, the defendant pleaded, under the 6 & 7 Vict. c. 96, s. 2, the insertion of a full apology and payment of 40*s.* into Court. The jury having found that the apology was not sufficient, but that the 40*s.* paid into Court was sufficient to cover the damage, the Judge directed a verdict for the plaintiff, with 1*s.* damages. — *Held*, that the plaintiff was deprived of costs, by the 3 & 4 Vict. c. 24, s. 2.

*Semble*, that the jury should have assessed the damages irrespective of the 40*s.* paid into Court, and that the defendant was entitled to have such sum returned to him.

**LEOFRIC TEMPLE** had obtained a rule calling on the defendant to shew cause why the Master should not tax the plaintiff his costs.

The action was for a libel published in a newspaper. The defendant pleaded, under the 6 & 7 Vict. c. 96, s. 2, that the libel was inserted without actual malice and without gross negligence in the publication of a bonâ fide report of the proceedings at a public meeting, and that, before the commencement of the action, he inserted an apology for the libel; and he brought into Court 40*s.* by way of amends for the injury sustained by the plaintiff by the publication of the libel, and said that the said sum was sufficient to satisfy the plaintiff's claim in respect of the matter pleaded to. The plaintiff having taken issue on the plea, the jury found that the apology was sufficient in its terms, but that the type should have been larger and the apology inserted in a more prominent part of the newspaper; that the 40*s.* paid into Court was sufficient to cover the actual damage. Whereupon the learned Judge directed the entry of a verdict for the plaintiff with 1*s.* damages (*a*). The Master refused to tax or allow any costs to the plaintiff.

*Blackburn* shewed cause.—The 3 & 4 Vict. c. 24, s. 2, enacts, that “If the plaintiff in any action of trespass, or of trespass on the case, brought or to be brought in any of her Majesty's Courts at Westminster, &c., shall *recover, by the verdict of a jury, less damages than forty shillings*, such plaintiff shall not be entitled to recover or obtain from the

(*a*) See 3 H. & N. 735.

defendant, in respect of such verdict, any costs whatever," unless the Judge certifies as therein mentioned. The defendant has got 41s. but he did not recover it by the verdict of the jury. The object of the Act was to prevent a plaintiff putting a defendant to the expense of a trial where the damages to be recovered would be so small as not to amount to 40s. In *Reid v. Ashby* (a), it was held that this statute applied to a case where the plaintiff having proceeded after the defendant had paid into Court 50*l.*, recovered 20s. in addition. It was urged that the plaintiff had recovered 51*l.* in the action, and that there was nothing in the statute to take away his right to full costs: that the construction contended for would in all cases enable a defendant, by paying money into Court, to deprive the plaintiff of his legitimate damages. The Court, admitting that such would be the effect of their decision, held themselves bound by the words of the Act. [*Channell*, B.—Here the jury did not award any damages to the plaintiff; therefore the case resembles *Newton v. Rowe* (b).]

*Leofric Temple*, in support of the rule.—The plaintiff's right to costs upon the plea of payment into Court depends upon the 6 & 7 Vict. c. 96, s. 2. [*Pollock*, C. B.—That statute will not assist the plaintiff. The payment into Court was conditional. The plea not being proved, the payment into Court was not warranted by law, and the defendant ought to have his money back again. Damages should have been assessed wholly irrespective of the plea.]

Per CURIAM (c).—The rule must be discharged, with costs.

Rule discharged, with costs.

(a) 13 C. B. 897.

(b) 1 C. B. 187.

(c) *Pollock*, C. B., *Martin*, B.,  
*Watson*, B., and *Channell*, B.

1859.

Jan. 26. THE NEW BRUNSWICK AND CANADA RAILWAY AND LAND  
COMPANY (LIMITED) v. MUGGERIDGE.

A Company incorporated under the Joint Stock Companies Act, 1856, issued a prospectus at the foot of which was a printed form of application for shares. By the prospectus it was requested that each applicant, in filling up the form, would state for which class of shares he applied, and that all applications must be accompanied by a remittance of 2*l.* per share deposit on the number of shares applied for, and should less number be allotted the amount paid in excess would be returned.

The defendant paid into the bank of the Company 600*l.*, and filled up and sent to the directors the printed form at the foot of the prospectus as follows:—"Gentlemen,—Having paid into the hands of the bankers of the Company 600*l.*, I request you will allot me 100 shares of Class A, 200 shares of Class B. And *I hereby agree to accept such shares, or any less number, that may be allotted to me, and to pay the future calls thereon.*" The directors allotted to the defendant 50 shares of Class A and 200 of Class B, and returned him 100*l.*, the balance of his deposit. A printed copy of the memorandum and articles of association, at the foot of which was a form of memorandum consenting to be a shareholder, was sent to the defendant; but it was not *signed* by him. The defendant had notice that the share certificates and interest warrants were ready, and he requested that they might be forwarded to him. His name was placed on the register of shareholders for the shares allotted to him. In an action for calls:—*Held*, that the defendant was not a shareholder in the Company.

THE declaration alleged that the defendant was indebted to the plaintiffs in 1000*l.* for two calls of 2*l.* each upon 250 shares in the Company, whereof at the time of making such calls the defendant was the holder, and which calls were duly made under the Joint Stock Companies Acts, 1856, 1857.

The defendant pleaded (*inter alia*)—That he was not the holder of the shares.

The cause came on for trial before *Channell*, B., at the Middlesex Sittings after last Trinity Term, when by consent a verdict was found for the plaintiffs for 1030*l.* 19*s.* 2*d.*, subject to the opinion of this Court upon the following case:—

The plaintiffs were a Joint Stock Company (Limited), registered and incorporated under the Joint Stock Companies Acts, 1856, 1857; and the Company was registered under those Acts on the 25th September, 1856, and a certificate of the incorporation of the Company was duly given on that day.

In July, 1856, several persons subscribed their names to

a memorandum of association in the form required by the 19 & 20 Vict. c. 47, for the purpose of forming the above mentioned Company. On this memorandum were indorsed articles of association signed by the subscribers to the said memorandum, prescribing regulations for the Company. But for the purpose of this case it may be considered that these articles did not, except as hereinafter mentioned, extend to modify the regulations contained in the table marked B. in the schedule to the last mentioned Act.

The capital of the Company was by the memorandum of association fixed at 800,000*l.*, divided into 40,000 shares of 20*l.* each; and by the articles of association these shares were divided into classes called A shares, B shares and C shares. The articles prescribed that calls on the shares of the Company might be made at such times as the directors should appoint, but that no calls should exceed 2*l.* per share, or be made at shorter intervals than three months; and ten gentlemen, therein named, and who had agreed to take the necessary number of shares in the Company, were by the said articles appointed the first directors of the Company.

In July, 1856, printed prospectuses were issued, by the subscribers to the said memorandum and articles, in which the capital, and number of shares, and the objects of the Company, and other particulars were stated; and at the end thereof, was a printed form of application for shares in the Company. By these prospectuses, it was requested that each applicant, in filling up this form, would state for which class of shares he applied; and also that all applications must be accompanied by a remittance of 2*l.* per share deposit on the number of shares applied for; and that, should a less number be allotted than were applied for, the amount paid in excess would be returned. The names of the ten persons named by the said articles of association as the directors of

1859.  
  
 NEW  
 BRUNSWICK  
 AND  
 CANADA  
 RAILWAY CO.  
 v.  
 MUGGERIDGE.

1859.  
 ~~~~~  
 NEW  
 BRUNSWICK  
 AND  
 CANADA  
 RAILWAY CO.  
 v.  
 MUGGERIDGE.

the Company were published in the prospectus as such directors.

One of these prospectuses, in the month of July, 1856, came to the hands of the defendant; and on the 19th of that month, he paid to the directors of the Company 600*l.*, by a cheque drawn by him for that amount upon the Bank of London.

A receipt, dated the 19th July, 1856, was given, to the defendant, by the cashier of the said bank, for the said sum of 600*l.*, as money to be placed to the credit of the ten persons named therein, and who were the said parties mentioned in the said articles of association, and also in the said prospectus, as directors of the Company.

On the same day, and after making this payment, the defendant filled up, and sent to the directors of the said Company, the form of receipt printed at the foot of the prospectus he had received. This form, when thus filled up and sent, was as follows, and was signed by the defendant.

“Form of Application for Shares.

“To the directors of the New Brunswick and Canada Railway and Land Company.

“Gentlemen—Having paid into the hands of Messrs. (Bank of London), the bankers of the proposed Company, the sum of 600*l.*, I request you will allot me 100 shares of Class A, 200 shares of Class B, in the said undertaking. And I hereby agree to accept such shares or any less number that may be allotted to me, and to pay the future calls thereon.

“Signature, W. Muggeridge,

“Profession, Corn Merchant,

“Residence, 3, Fowkes Buildings,  
 Gt. Tower St., City.”

On the 24th July, 1856, a meeting of the directors of

the Company was held, at which 50 A class shares and 200 B class shares were allotted to the defendant; and on the same day a letter was, by order of the Board, sent to the defendant, of which the following is a copy.

1859.  
NEW  
BRUNSWICK  
AND  
CANADA  
RAILWAY Co.  
v.  
MUGGERIDGE.

“London, 26 Parliament St., Westminster.

“To Wm. Muggeridge, Esq., “29th July, 1856.

“3, Fowkes Buildings, Gt. Tower St.

“The New Brunswick and Canada Railway and Land Company (Limited).

“Sir—In pursuance of your application, I am directed by the Board to inform you that 50 A class and 200 B class shares have been allotted to you, upon which the deposit is 500*l*.; and I enclose you a crossed cheque for the balance of your deposit as below, the receipt of which I shall be obliged by your acknowledging.

“I am Your obedt. Servt.,

“J. W. Byrne, Secy.

“Deposit paid into Company’s Bankers.....£600

“Deposit on shares allotted ..... 500

“To be returned .....£100.”

In this letter was enclosed a cheque on the said Bank of London in favour of the defendant for 100*l*., and which sum he duly received. The defendant retained the last mentioned letter, which was never returned to the Company.

On the 14th August, 1856, a printed copy of the memorandum and articles of association, at the foot of which was appended a form of memorandum (a) of consent to be a

(a) The form of memorandum which was appended to the case was as follows :—

“I of hereby accept shares in the New Bruns-

wick and Canada Railway Company, and I consent to be registered as such shareholder accordingly in the register of shareholders of the Company.”

1859.  
 {  
 NEW  
 BRUNSWICK  
 AND  
 CANADA  
 RAILWAY CO.  
 v.  
 MUGGERIDGE.

shareholder, was forwarded by the secretary of the Company, to the defendant's address, and was never returned.

On the 2nd March, 1857, a printed notice was sent, by the secretary of the Company, to the defendant, stating that the share certificates were ready for delivery, and that the scrip must be lodged, for registration, at the offices of the Company, one week previous to transmitting the share certificates; and on the 30th April, 1857, the following letter was sent to the defendant by the said secretary.

“The New Brunswick and Canada Railway and Land Company (Limited).

“5, Whitehall, S. W., 30th April, 1857.

“Sir—The warrant for the interest due on your shares is lying here, waiting the exchange of your scrip for the share certificate.

“If you have mislaid your scrip, you can send the bankers' receipt for deposit, and letter of allotment along with the articles of association signed, and I will forward you in exchange the interest warrant and share certificate.

“I am, Sir, Your obedt. Servt.,

“Wm. Muggeridge, Esq.,

“J. W. Byrne, Secy.

“3, Fowkes Buildings, Gt. Tower St., E. C.”

On the 13th May, 1857, the secretary of the Company received from the defendant a letter (without date) signed by him, of which the following is a copy, and in which was enclosed the bankers' receipt hereinbefore mentioned for the 600*l*. paid by the defendant.

“3, Fowkes Buildings, Gt. Tower St., City, E. C.

“Sir—Herewith I enclose you bankers' receipt for 600*l*., being the only document I possess relative to the New Brunswick and Canada Railway and Land Company, and

shall feel obliged by your forwarding me interest warrant and share certificates.

“I am, Sir, Your obedt. Servt.,

“J. W. Byrne, Esq., Secy.

“W. Muggeridge.

“New Brunswick and Canada Railway Company.”

To this letter the secretary of the Company, on the 15th May, 1857, wrote and sent the following reply, enclosing a printed copy of the said articles of association.

“New Brunswick and Canada Railway and Land Company (Limited).

“Offices, 5, Whitehall, 15th May, 1857.

“Sir — Your letter without date, enclosing bankers' receipt for 600*l.*, the deposit on your shares allotted to you in this undertaking, is to hand. I beg to enclose you a copy of the articles of association for your signature, upon the receipt of which I will forward to you the share certificates and interest warrants.

“Yours faithfully,

“Wm. Muggeridge, Esq.

“J. W. Byrne.”

On the 10th June, 1857, the secretary of the Company forwarded to the defendant a printed notice, that the first ordinary half-yearly meeting of the proprietors of the Company would be held at a place therein mentioned on the 30th June then instant.

This meeting was held at the said time and place, and the register of shareholders in the Company was then produced and the common seal of the Company affixed thereto, and the register signed by the chairman. The defendant was inserted and described in this register, before and at the time of such sealing and signing thereof, as the holder of 50 A shares and 200 B shares in the said Company.

(The case then stated the making of the calls, and that notice thereof was given to the defendant.)

The defendant did not pay either of the said calls.

1859.

NEW  
BRUNSWICK  
AND  
CANADA  
RAILWAY CO.  
v.  
MUGGERIDGE.

1859.

NEW  
BRUNSWICK  
AND  
CANADA  
RAILWAY CO.  
v.  
MUGGERIDGE.

The defendant did not sign the memorandum or articles of association, or the above mentioned form of memorandum consenting to be a shareholder appended thereto, or any other document than is hereinbefore mentioned as having been signed by him.

The Court is to be at liberty to draw any inference of fact which a jury would be at liberty to do upon the facts above stated.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover in this action. If the Court should be of opinion that they are so entitled, the verdict is to stand. If the Court should be of a contrary opinion, judgment of nonsuit is to be entered.

*Phipson*, for the plaintiffs.—The question is, whether the defendant is a shareholder in the Company. That depends on whether a person who applies for shares by a writing in which he agrees to accept any number which may be allotted to him, but signs no other document testifying his acceptance, becomes a shareholder with reference to the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47). By the Schedule of that Act, Table B. (1), “No person shall be deemed to have accepted any share in the Company unless he has testified his acceptance thereof by writing under his hand, in such form as the Company from time to time directs.” The 19th section provides that “every person who has accepted any share in a Company registered under this Act, and whose name is entered in the register of shareholders, and no other person (except a subscriber to the memorandum of association in respect of the shares subscribed for by him), shall for the purposes of this Act be deemed to be a shareholder.” Therefore, if the party has not signed the memorandum of association, he must have accepted the shares and his name must be

on the register of shareholders. Here the defendant's name was on the register of shareholders, and the only question is whether he has accepted the shares. The Company issued a prospectus offering shares to the public on the terms of their filling up the prescribed form and paying a deposit. The defendant paid the deposit and filled up the form, whereby he agreed to accept the shares applied for or any less number that might be allotted to him. He has therefore "testified his acceptance thereof by writing under his hand," within the meaning of the Schedule, Table B. (1). [*Watson, B.*—He must testify his acceptance "in such form as the Company from time to time direct." The Company sent him their form of memorandum of consent to be a shareholder, but he never signed it. *Martin, B.*—It is like the Statute of Frauds: the legislature has said that a person shall not be a shareholder unless he has done certain acts.] The defendant sent in his bankers' receipt and applied for his interest warrant and share certificates: the Company promised to forward them on his signing the articles of association. Suppose the defendant had signed and returned it with the memorandum of consent to be a shareholder torn off. [*Martin, B.*—That would not do. You seek to make the defendant liable on a parol contract.] Unless the agreement contained in the form of application is an acceptance, it might happen that, after all the shares were allotted and the deposits paid, the applicants would refuse to sign any other document and the Company would be at an end. [*Martin, B.*—The words of the Act are, "no person shall be *deemed* to have accepted any share," that is, no matter what he has done, "unless he has testified his acceptance thereof by writing under his hand, in such form as the Company from time to time directs." The defendant has never done so.] —He also referred to sections 7, 9 and 13.

1859.  
  
 NEW  
 BRUNSWICK  
 AND  
 CANADA  
 RAILWAY CO.  
 v.  
 MUGGERIDGE.

1859.

NEW  
BRUNSWICK  
AND  
CANADA  
RAILWAY CO.  
v.  
MUGGERIDGE.

*Wilde* (with whom was *Vernon Harcourt*), for the defendant, was not called upon to argue.—He referred to *The Waterford, Wexford, Wicklow and Dublin Railway Company v. Pidcock* (a).

Per CURIAM (b).—There must be judgment for the defendant.

Judgment for the defendant.

(a) 8 Exch. 279.

(b) *Pollock, C. B., Martin, B., Watson, B., and Channell, B.*

Jan. 24.

PHILLIPS and Others v. CLIFT.

To an action on an indenture of apprenticeship for a breach of covenant by the master in not instructing the apprentice and providing him with food and lodging, the defendant pleaded that the apprentice conducted himself in so dishonest a manner in the defendant's business, and defrauded and robbed the defendant, so that it became unsafe for the defendant to continue him in his service,

COVENANT.—The declaration stated that on 28th October, 1854, an indenture of apprenticeship was made and entered into, and to which the plaintiffs and the defendant and one W. Ryde were parties; and by which indenture it was witnessed that William Ryde, therein described as aged fifteen years or thereabouts, son of Sarah Ryde, of &c., widow, with the consent of his mother, did put himself apprentice to the defendant, therein described as Joseph Clift, of &c., chemist, and with him, after the manner of an apprentice, to serve from the 30th August then last for the term of four years and one half of another year, during which term the said apprentice his master faithfully should serve, his secrets keep, his lawful commands gladly do; he should do no damage to his master nor see it to be done by others, but to his power

whereupon the defendant dismissed him.—*Held.* on demurrer, that the covenants in the indenture were independent covenants, and consequently the plea was bad.

An allegation that a party covenanted by "indenture," imports that the covenant was under seal.

should let or forthwith give warning to his master of the same; he should not waste the goods of his master, nor lend them unlawfully to any; he should not play at cards or dice or any unlawful games, whereby his master might have any loss, with his own goods or others' during the term without the license of his master; he should neither buy nor sell; he should not haunt taverns, alehouses or play-houses, nor absent himself from his master's service day or night unlawfully; but in all things as a faithful apprentice he should behave himself towards his master and all his during the term: and the defendant, in consideration of the sum of 99*l.* 19*s.*, to be paid to him by the plaintiffs as therein mentioned, did thereby covenant with Sarah Ryde, and also as a separate covenant with and to the plaintiffs, that he, the defendant, his apprentice in the art of a chemist and druggist, which he then carried on, by the best means that he could, should teach and instruct, or cause to be taught and instructed, during the term; and would, during the term, at his own charge provide for William Ryde proper and sufficient meat, drink and lodging: and for the true performance of all and every the said covenants and agreements either of the said parties thereto bound himself, herself and themselves unto the other and others of them by the said indenture.—Averments: that the said William Ryde entered and the defendant received him into his service: that the plaintiffs and Sarah Ryde had done and performed all things to be done and performed &c. to entitle them to a performance by the defendant of his covenants.—Breach: that the defendant did not, nor would, the said William Ryde in the art of a chemist and druggist, which the defendant carried on, by the best means that he could, teach and instruct, or cause to be taught and instructed, during the term; nor did, nor would, the defendant, during the term, at his own charge provide

1859.  
PHILLIPS  
v.  
CLIFT.

1859.  
PHILLIPS  
v.  
CLIFT.

for William Ryde proper and sufficient meat, drink and lodging, and dismissed and discharged him from his service, and would no longer permit him to remain therein, &c.

Plea:—That after the making of the indenture in the declaration mentioned, and after William Ryde entered into the service of the defendant, William Ryde did not, according to the covenants of the indenture, faithfully serve the defendant as a faithful apprentice, but, on the contrary thereof, conducted himself in so improper and unfaithful and dishonest a manner in the defendant's said business, and defrauded and robbed the defendant, so that it became unsafe for the defendant to continue the said William Ryde in his service, or to continue to instruct him in his business, or to permit him to reside or remain with the defendant: whereupon, as he lawfully might, he dismissed him from his service and refused any longer to permit him to remain therein, or to instruct him in his business, or to provide for him any longer meat, drink and lodging.


Demurrer and joinder therein.

No one appeared to support the demurrer.

*Vernon Harcourt*, in support of the plea.—The demurrer is founded on the authority of *Winstone v. Linn (a)*, where it was held that the covenants in an indenture of apprenticeship are independent covenants, and consequently that acts of misconduct on the part of the apprentice are no answer to an action for breach of the covenant by the master to instruct and maintain the apprentice. There, however, the misconduct of the apprentice consisted in his leaving his master's service, and though he afterwards returned and offered to serve during the residue of the term, his master refused to receive him. It is conceded that it is not every breach of covenant which will justify a

(a) 1 B. & C. 460.


master in dismissing his apprentice; but the case is different where the covenant which is broken goes to the very essence of the contract. Thus, in *Wise v. Wilson* (a), Lord Denman, C. J., ruled that, where a young man seventeen years old was placed with a surgeon as pupil and assistant, if he on some occasions came home intoxicated, that *alone* would not justify the surgeon in dismissing him. But if, by employing the shop boy to compound the medicines, he occasioned real danger to the surgeon's practice, that would be a sufficient justification for his dismissal. If the law were otherwise this consequence would follow, that though the apprentice committed a felony and was sentenced to penal servitude, his master would nevertheless be bound to receive him at the expiration of his sentence. Here the plea avers that the apprentice defrauded and robbed the defendant, so that it became unsafe for the defendant to continue him in his service. The reasons upon which the decision in *Winstone v. Linn* proceeded have no application to such a case. [Channell, B.—'The question is, whether the covenants are dependent or independent.] "Where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration" (b). That rule was fully considered in the case of *Ellen v. Topp* (c), where an infant was placed by his father as apprentice to a master, who was described in the indenture as an "auctioneer, appraiser and corn factor, to learn his art, and with him after the manner of an apprentice to serve." The master relinquished his trade of corn factor, whereupon the apprentice absented himself from his master's service; and

1859.  
  
 PHILLIPS  
 v.  
 CLIFT.

(a) 1 C. &amp; K. 662.

(b) 1 Wms. Saund. 320 c.

(c) 6 Exch. 424.

1859.  
  
 PHILLIPS  
 v.  
 CLIFT.

it was held that the relinquishment by the master of his trade of corn factor was a good answer to an action by him against the father for the desertion of the apprentice. That decision proceeds on the ground that the obligation to serve was dependent on the corresponding obligation to *teach as an apprentice*, and that if the master was not ready to teach in the *very trade* which he had stipulated to teach, the apprentice was not bound to serve. So here, the covenant of the master is dependent on the good conduct of the apprentice. It would seem from the case of *Mercer v. Whall* (a), that acts of misconduct will justify an attorney in discharging his articked clerk; and there is no real distinction between the case of an articked clerk and an apprentice. [*Channell, B.—Wise v. Wilson* (b) was the case of an agreement, not a covenant under seal.] *Atkinson v. Smith* (c) shews that there is no difference in that respect. Besides, the declaration does not state that the contract was under seal. [*Pollock, C. B.—*It states that it was by *indenture*, and that is sufficient.]—He also referred to the note to *Cutter v. Powell* (d).

POLLOCK, C. B.—We are all of opinion that the plea is bad. I do not think it necessary to express any opinion as to what would be the effect of an allegation in the plea, that the apprentice had been guilty of a felonious stealing, or had been actually convicted and suffered punishment, for this plea alleges neither the one nor the other. The plea certainly does not allege a felonious taking, for although it states that the apprentice “*deprived and robbed*” the defendant, that does not necessarily import a felony. The question then is, whether we are not bound by the authorities, and whether the misconduct of the apprentice is any answer to this action. I am of opinion that it is not.

(a) 5 Q. B. 447.


(b) 1 C. & K. 362.

(c) 14 M. & W. 686.

(d) 2 Smith's Lem. Cas. 11.

MARTIN, B.—I am of the same opinion. The question arises, not upon pleading, but upon an indenture executed by the defendant; and if he has entered into an improvident bargain, he must suffer the consequences. It is indeed argued, that it does not appear that the contract was by deed; but it is stated that the plaintiff covenanted by *indenture*; and the term “indenture” means an instrument under seal. In Co. Litt. s. 370, and some following sections, Lord *Coke* treats of an indenture, or deed indented, as distinguished from a deed poll; and the same will be found in Shep. Touch. p. 50. What then is the contract here? The friends of the apprentice contract that he shall faithfully serve his master for a certain term, his secrets keep and his lawful commands obey, &c.; and the defendant, in consideration of 99*l.* 19*s.* to be paid to him, covenants with them that he will teach the apprentice the art of a chemist and druggist and provide him with meat, drink, and lodging, &c. The defendant has absolutely covenanted under seal that he will do those things, and he must therefore do them.

WATSON, B.—I am of the same opinion. It has long been considered that the covenants in a deed of apprenticeship are independent covenants. There are several decisions to that effect; and if we look at the terms of the indenture, it is obvious that it must be so. The master on the one hand is to teach the apprentice and *de die in diem* to provide him with food; on the other hand certain covenants are entered into by the friends of the apprentice. In the simple relation of master and servant, the servant is bound to obey all the lawful commands of his master, and if he commits any unlawful act the master may dismiss him. But if an apprentice misbehaves himself the master has

1859.  
  
 PHILLIPS  
 v.  
 CLIFT.

1859.  
 PHILLIPS  
 v.  
 CLIFT.

the power of correcting him by personal chastisement (a), provided it be moderate; and the whole control as regards his morals is also with the master. Here the plea alleges that the apprentice defrauded and robbed the defendant, so that it was unsafe for the defendant to keep him any longer. I do not know what that means. The apprentice may have taken sweetmeats from a jar, or a shilling from the till, for which offences he might be corrected by personal chastisement or kept in confinement, but the master has no right to dissolve the contract.

CHANNELL, B.—I am also of opinion that the plaintiffs are entitled to judgment. The demurrer proceeds on the authority of *Winstone v. Linn* (b), and I cannot distinguish that case from the present. I presume that the plea is founded on the case of *Wise v. Wilson* (c); not that it is contended that one act of misconduct would entitle the master to dismiss the apprentice; for the plea alleges several acts, and that it became unsafe for the defendant to continue the apprentice in his service. With respect to the case of *Wise v. Wilson*, in the first place what fell from Lord Denman, C. J., confirms the doctrine laid down in *Winstone v. Linn* as applicable to an apprentice, for he treated the case as one of a mixed character, between that of an apprentice and a servant; and there is nothing of that kind here. Secondly, in that case the plaintiff obtained the verdict, so that there was no opportunity for bringing the ruling of the learned Judge under the consideration of the Court in banc. For these reasons *Wise v. Wilson* does not apply; and *Winstone v. Linn* has been followed in several cases.

Judgment for the plaintiffs.

(a) See 1 Black. Com. 423 :  
 Fitz. Nat. Brev. 163.

(b) 1 B. & C. 460.  
 (c) 1 C. & K. 662.

1859.

Jan. 15.

EDWIN HARDON and JOHN CHARLESWORTH, Overseers of the Poor for the time being of the Township of Stockport, *v.* LLOYD HESKETH BAMFORD HESKETH.

**DECLARATION.**—The plaintiffs, overseers for the time being of the poor of the township of Stockport, in the county of Chester, which said township was and is a township having separate overseers of the poor and maintaining its own poor separately (*a*), sue the defendant for money payable by the defendant to the plaintiffs as such overseers, for the defendant's use, by the plaintiffs' permission as such overseers, of messuages and lands of the plaintiffs as such overseers as aforesaid; and for the defendant's use for divers, to wit, twelve years, by the permission of the respective overseers for the time being of the poor of the said township, predecessors in office of the plaintiffs, of messuages and lands of the said respective overseers for and on behalf of such township.—There was also a count on a covenant for payment of a freehold rent charge on land conveyed in fee to one Davenport, whose estate was alleged to have come to the defendant in fee (*b*).

Plea (*inter alia*): Never indebted.—Whereupon issue was joined.

At the trial, before *Crowder, J.*, at the last Chester assizes, it appeared that the action was brought to recover the arrears of a rent of 6*l.* 14*s.* 8*d.* The plaintiffs' counsel put in certain interrogatories, and the answers to them by the defendant, which were as follows:—

“I am by myself or my tenants in possession of certain lands, in or near to Shaw Heath, Nangreave, and Cole

The defendant and his predecessors in estate had paid to the plaintiffs and their predecessors, overseers of the poor of the township of S., an annual sum of 6*l.* 14*s.* 8*d.*, expressed to be for rent for common lands. It was admitted that the defendant was in possession of the lands out of which the rent issued, but they were not identified, and no evidence was given of their extent or value. The defendant would not produce his deeds. —*Held*, that there was evidence on which a jury might find for the plaintiff on a count for use and occupation.

(*a*) See 59 Geo. 3, c. 12, ss. 17. 35.

(*b*) See *Varley v. Leigh*, 2 Exch. 446

1859.  
HARDON  
v.  
HESKETH.

Green, in the township of Stockport, &c. In the month of February 1840, and in each preceding year between that year and 1815, I paid by my agents a yearly sum of 6*l.* 14*s.* 8*d.* to the overseer or assistant overseer for the time being of the said township. I believe such payment was made in respect of some part or parts of the aforesaid lands which the plaintiffs alleged was or were, before the said lands came into the possession of those whose estate I now have, common lands belonging to the township of Stockport. I paid by my agents the said yearly sum of 6*l.* 14*s.* 8*d.*, for about thirty-one years, till 1846. I am at present in possession by myself or my tenants of the lands mentioned in my answer to the first interrogatory, and such possession has not been determined in any manner whatsoever, and I say that my father did precede me in the possession and receipt of rents of the said lands."

The defendant had also been examined *vivâ voce*, before a Judge at Chambers, under the 53rd section of the Common Law Procedure Act, 1854. In the course of this examination (which also was put in on the part of the plaintiffs) he said that, except receipts signed on behalf of the overseers of the poor, he believed he had not in his possession or power, nor did he know anything as to the custody of any other documents relating to the matters in dispute in the action. He further stated:—"I believe that Davenport was my predecessor in this estate. I have no deeds relating to this property: none whatever. I keep my own deeds. I say I believe I have none, because none are mentioned in the schedule of deeds. None to Mr. Davenport are mentioned." The defendant however referred the plaintiffs to his attorney, Mr. Boothroyd, for information on this point. The plaintiffs' attorney proved that he had afterwards seen Mr. Boothroyd, who said he had looked over deeds since the defendant's examination. On being asked if any of the deeds so examined related to the defendant's

property at Shaw Heath, Nangreave, or Cole Green, Boothroyd said that he objected to produce those deeds: he would produce them at the assizes if advised by counsel to do so. On being asked if there were any chief rents named in those deeds, he refused to answer the question: he said "the deeds will speak for themselves if produced; there is no chief rent of 6*l.* 14*s.* 8*d.* mentioned in any deed." He declined to say whether any larger chief rent was mentioned, or to say anything further on the subject. Mr. Boothroyd produced receipts for half-yearly payments of 3*l.* 7*s.* 4*d.* from 1827 to 1846: each voucher was indorsed "half a year's rent for common lands" in the hand writing of Mr. Boothroyd. 'The overseers' books, from 1767 to the present time, were put in, from which it appeared that the sum of 3*l.* 7*s.* 4*d.* had been received half-yearly from persons named William Bamford, Robert Bamford, Lloyd Hesketh, R. Hesketh (whom the defendant in his examination had admitted to be his predecessors in estate) and the defendant, successively, as common land rents. At the conclusion of the plaintiffs' case, the defendant's counsel submitted that there was no evidence to go to the jury, and the learned Judge being of that opinion the plaintiffs were nonsuited.

*Welsby*, in last Michaelmas Term, obtained a rule calling on the defendant to shew cause why the nonsuit should not be set aside and a new trial had, on the ground that there was evidence to go to the jury in support of the first count of the declaration.

*Grove* and *Hughes* now shewed cause.—Possibly the facts may be consistent with the presumption that this was a rent charge. [*Welsby*.—Before the 59 Geo. 3, c. 12, overseers had no power to convey or lease lands. *Watson*, B.—Before the passing of that Act, parish lands were usually vested in trustees and managed by the overseers.] The

1859.  
  
 HARDON  
 v.  
 HESKETH.

1859.  
 HARDON  
 v.  
 HESKETH.

lands must have varied in value in the long period during which this sum was paid, and being common lands and the payment small and invariable in amount, there is no presumption that the money was paid in respect of rent as between landlord and tenant. The word "rent" rather imports rent charge than rent service. [*Martin, B.—Littleton* says, s. 213, there are three manner of rents, that is to say, rent service (which he puts first), rent charge, and rent seck.] There is nothing to shew that this was rent service rather than a rent charge. The evidence was equally consistent with either view of the case and the matter is wholly uncertain, therefore there was no evidence from which the jury would have been warranted in finding in favour of either alternative: *The Midland Railway Company v. Bromley* (a), *Doe d. Welsh v. Langfield* (b). [*Martin, B.—In the Termes de la Ley, rent seck is said to be a thing against common right, as well as rent charge. We have to ascertain the meaning of the word "rent," and the presumption is that it is something which is of common right. Pollock, C. B.—For one instance where there is a rent charge there are a hundred cases of rent service. Watson, B., referred to Doe d. Robertson v. Gardiner* (c) and *Welsby to Doe d. Higgs v. Terry* (d).]

*Welsby* and *Beavan*, who appeared to support the rule, were not called upon.

POLLOCK, C. B.—We are all of opinion that the rule must be absolute. It is true that in this case the evidence is not such as that by which a claim for use and occupation is usually sustained. But it is clear that the plaintiffs had a claim to money which was paid for one hundred years as "rents" for land called common land.

(a) 17 C. B. 372.

(b) 16 M. & W. 497.

(c) 12 C. B. 319.

(d) 4 A. & E. 274.

The plaintiffs therefore had a right to claim the amount as rent service, rent charge or rent seck. The question is which it was. The defendant had in his possession deeds which might have removed the doubt, but he refused to produce them. If, therefore, there was the smallest evidence as to which it was, the jury ought to have been called upon to decide the question. The Court would not have disturbed a verdict for the plaintiffs, on the count for use and occupation, unless the defendant had shewn what right he had in the land. I think that not only was there a presumption in favour of this being rent service, but that the Judge should have told the jury that they ought to presume it was a rent service, and they should have so found it.

MARTIN, B.—I think there was evidence for the jury. There was no evidence of the value of the lands out of which the rent arose. If the defendant had proved that the lands were of vastly greater value than the rent, that might have raised a presumption that the rent was not a rent service; but the defendant, who was in possession of the land, would not shew his title deeds. If I had been on the jury I should have concurred in a verdict for the plaintiffs.

WATSON, B.—I am of the same opinion. Parish lands which were formerly vested in trustees, were often let to a principal person in the parish, and continued for long periods to be held by the same families. If there was a grant of a rent charge, traces of it would appear upon the defendant's title deeds. The defendant did not swear that he has no title deeds relating to this rent, but only that he has no conveyance to Mr. Davenport. It may be that the land is so intermixed with other land that it cannot be identified; but the defendant acknowledges that he is in possession of the land out of which the rent issues.

Rule absolute.

1859.

HARDON  
v.  
HESKETH.

1859.

Jan. 24.

DAVYS, Appellant, DOUGLAS, Respondent.

An appeal lies under the 20 & 21 Vict. c. 43, where the justices have dismissed the information or complaint.

A booth-theatre, which is taken to pieces and carried from place to place for theatrical performances, is not a "house or other place of public resort for the public performance of stage plays" within the meaning of the 2nd section of the 6 & 7 Vict. c. 68.

**T**HIS was an information preferred on the 9th July, 1858, by Edmund Davys against John Douglas: For that, on the 7th July instant, at Fletton in the county of Huntingdon, the said John Douglas, of the same place, stage manager, did unlawfully keep a place of public resort, to wit, a theatre, for the public performance of stage plays without authority by virtue of letters patent from her Majesty, her heirs and successors or predecessors, or license from the Lord Chamberlain of her Majesty's Household for the time being, or her Majesty's justices of the peace of the said county of Huntingdon, within which said county the said place of public resort is situate, contrary to the statute &c.; and after hearing the parties and the evidence adduced by them before us, the undersigned, being three of her Majesty's justices of the peace in and for the said county of Huntingdon, on the 14th day of July instant, we, the said justices, did thereupon dismiss the said information without costs. And the said Edmund Davys, alleging that he is dissatisfied with the said determination as being erroneous in point of law, we, the said justices, in pursuance of the statute (20 & 21 Vict. c. 43), state the following case.—The case then set out the 1st, 2nd, 3rd, 5th, 11th, 16th and 23rd sections of the 6 & 7 Vict. c. 68, and the proviso in the 1st section of the 11 & 12 Vict. c. 43.

The defendant is the manager of a company of strolling players, and is the owner of a booth-theatre, which is taken to pieces and carried with them from place to place, called "Douglas's Theatre."

There are two fairs held annually, in July and October,

at the town of Peterborough, which is divided from the parish of Fletton and county of Huntingdon by the river. The fair in July is called "Saint Peter's Fair," and is held on the 9th, 10th and 11th days of July, and confined to the town of Peterborough. That held in October is called "Bridge Fair," and is held as well in the fair meadow (which is in the said parish of Fletton and in which the said booth-theatre was put up) as in the town of Peterborough.

It was proved that the defendant had applied for a license from the justices of the peace for the said county of Huntingdon, pursuant to the said Act, which had not been granted: that he put up his said theatre in the said fair meadow about the 6th of July, being, both as to time and locality, without the limits of the July fair: that he is the proprietor of such theatre: that he issued printed bills announcing that on Wednesday evening, the 7th day of July instant, Shakespeare's Tragedy of "Hamlet" would be performed, with other entertainments, in such theatre; and that the prices of admission to boxes, pit and gallery would be one shilling, six pence and three pence. It was proved that "Hamlet" was performed as announced, but it was not proved that one shilling, six pence and three pence, or any other sum of money or reward, was taken or charged directly or indirectly on the night of the 7th of July (being the opening night), or the purchase of any article made a condition for the admission of any one into the theatre, or that any distilled or fermented exciseable liquor was sold within it.

Having heard this evidence and the arguments of the attorneys for informant and defendant, we dismissed the information on the following grounds.—First, we were of opinion that the information had been laid under a wrong section of the act of parliament, the 2nd instead of the

1859.  
DAVYS  
v.  
DOUGLAS.

1859.  
DAVYS  
v.  
DOUGLAS.

11th, the so called theatre being in our judgment (although not then in a fair) of the character of "a booth or show" named in the 23rd section, and not of a "house" capable of being licensed under the 5th section, nor included in the phrase "house or other place of public resort," the words of section 2.

Secondly, notwithstanding the provision in the 1st section of the 11 & 12 Vict. c. 43, we did not feel justified (although the defendant's attorney consented to our deciding the case on the facts adduced, without asking for an adjournment,) in convicting the defendant under section 11 of the 6 & 7 Vict. c. 68, because we had no evidence before us that money was taken, nor any proof whatever of an "acting for hire" on the said 7th day of July instant beyond a mere play bill.

If we were correct in this dismissal, it is to stand. If not, a conviction is to be returned under the 2nd or 11th section of the 6 & 7 Vict. c. 68, as the Court shall direct, and such other proceedings taken as the Court shall also direct.

*Skinner*, for the respondent.—First, the justices had no power, under the 20 & 21 Vict. c. 43, to state a case for the opinion of this Court. An acquittal is a final relief to the person charged, and the Act does not in such case enable the superior Courts to hear an appeal and convict a person not before them. Under the 6 & 7 Vict. c. 78, any person aggrieved by an order of the justices may appeal to the quarter sessions: sect. 20. It is a fundamental principle of law that no person shall be twice in peril for one offence; and it is a principle equally clear that no person can be tried on a criminal charge in his absence. An acquittal is not an order. [*Martin*, B.—The 2nd section of the 20 & 21 Vict. c. 43, enacts, that

1859.  
 DAVYS  
 v.  
 DOUGLAS.

“after the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way, &c., *either party* to the proceeding before the said justice or justices may, if he is dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices, to state and sign a case setting forth the facts and grounds of such determination” &c.] By section 14, this proceeding is substituted for an appeal to quarter sessions, but the Act constituting the offence only gives an appeal to the party convicted, not to the prosecutor. By the 6th section of the 20 & 21 Vict. c. 43, “the Court to which a case is transmitted under this Act shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices, with the opinion of the Court thereon, or may make such other order in relation to the matter, and may make such orders as to costs, as to the Court may seem fit,” &c. The Court cannot affirm or amend an acquittal. [*Martin, B.*—They may remit the matter to the justices.] Then, if the justices rehear, are they bound to convict? By section 9, the justices “shall have the same authority to enforce any conviction or order which may have been affirmed, amended, or made by such superior Court, as the justice or justices who originally decided the case would have had to enforce his or their determination if the same had not been appealed against.” If the order is disobeyed the justices can only enforce it under that section: but it cannot apply to an acquittal, for how can the justices enforce an acquittal? It enforces itself. [*Martin, B.*—Nothing can be stronger than the language of the 6th section. *Channell, B.*—If the Court remit the

1859.  
 ~~~~~  
 DAVYS  
 v.  
 DOUGLAS.

matter to the justices, with an intimation that in their opinion the charge was proved, the justices would be bound to act upon it. It may be that the 9th section applies only to a conviction or order of the superior Court.]

POLLOCK, C. B.—We are all of opinion that there is a power of appeal in the case of an acquittal.

*Skinner*.—The information was properly dismissed. By the 6 & 7 Vict. c. 68, s. 2, “it shall not be lawful for any person to have or keep any house or other place of public resort, for the public performance of stage plays, without authority by virtue of letters patent, &c., or without license from the Lord Chamberlain, &c., or from the justices of the peace, as hereinafter provided,” &c. The defendant’s booth was not a “house or other place of public resort” within the meaning of that section. The expression “place of public resort” is used in the Vagrant Act, 5 Geo. 4, c. 83, s. 4; but in the case of *In re Jones (a)* there was no decision as to its meaning. The 11th section of the 6 & 7 Vict. c. 68 enacts “that every person who *for hire* shall act or present, or cause, permit, or suffer to be acted or presented, any part in any stage play, in any place not being a patent theatre or duly licensed as a theatre,” shall forfeit a sum not exceeding 10*l.* a day. The 16th section is a declaration as to what is “acting for hire,” viz. where any money or other reward is taken, or where the purchase of any article is made a condition for admission to the theatre, or where any play shall be acted in any house, room or place in which exciseable liquor is sold. Here there was no evidence of any such acting for hire.—The Court then called on

*Field*, for the appellant.—This booth was a “place of

(a) 7 Exch. 586.

public resort" within the meaning of the 2nd section of the 6 & 7 Vict. c. 68. The legislature meant any place to which the public resort for the purpose of witnessing theatrical performances. The preamble of the Act recites that "it is expedient that the laws now in force for regulating theatres and theatrical performances be repealed" &c. Then the 2nd section says that it shall not be lawful to keep any house or other place of public resort, for the *public performance* of stage plays, without authority &c. The 8th, 9th and 17th sections use the word "theatre." The interpretation clause (sect. 23) shews what the legislature intended to include within the 2nd section, for though it gives no definition of the term "place of public resort," it provides that the Act shall not "apply to any theatrical representation in any booth or show which by the justices of the peace &c. shall be allowed in any lawful fair." If the 2nd section does not apply to a booth of this description, the 9th section does not apply, and the justices would have no power to keep order within it. The definition of a "house" does not depend on the material with which it is constructed. [*Watson, B.*—Do you contend that a tent is a house?] The words "have or keep" in the 2nd section shew that the expression "place of public resort" means something more than an open space. By section 5, the justices may license "houses for the performance of stage plays;" and if, under that section, they have no power to license this booth, it is prohibited by the 2nd section.

POLLOCK, C. B.—We (a) are all of opinion that the decision of the justices ought to be affirmed.

Decision affirmed, with costs.

(a) *Pollock, C. B., Martin, B., Watson, B., and Channell, B.*

1859.  
 DAVYS  
 v.  
 DOUGLAS.

1859.

Jan. 19.

BROWN v. ROBINS.

The plaintiff was owner of a house erected in 1834 on solid ground. Previously to the building of the house a portion of the minerals had been gotten under a garden which adjoined the house. In 1838 a portion of the minerals was gotten under the defendant's land which adjoined the garden. In 1855 the defendant commenced getting out the rest of the minerals under his land. In 1857 the plaintiff's land sank, and the house was injured by the defendant's mining operations. It was found by the jury that the sinking of the plaintiff's land was caused by the defendant's workings: that

some damage would have happened, but not to the same extent, if the garden ground had been left solid: that the defendant knew of the excavations under the garden: that the land would have sunk in just the same whether there was a house on it or not; and, lastly, that the damage to the plaintiff's house by the sinking was 300*l.*; 250*l.* occasioned solely by the defendant's workings, and 50*l.* damages caused in part by the excavation under the garden.—*Held*: First, that, inasmuch as the sinking of the plaintiff's land was in no way caused by the weight of the house, the plaintiff was entitled to recover whether he had acquired a right to support for his foundations by the defendant's soil or not.

Secondly, that although the excavation under the garden contributed to the extent of 50*l.* to cause the damage, the plaintiff was entitled to the whole 300*l.*, because, if the defendant had not done the wrongful act complained of, no part of the damage would have occurred.

**DECLARATION.**—That whereas, before and at the time of the committing of the grievances, &c., the plaintiff was possessed of certain land with a certain house and outbuildings standing and being thereon; and whereas there were certain foundations of and supporting the said house and outbuildings, which the plaintiff had of right enjoyed and ought to enjoy, yet the defendant wrongfully, negligently, carelessly and improperly, without leaving sufficient support in that behalf, worked certain mines near to and adjoining the said land, whereby the said land and the said foundations of the said house and outbuildings sank, swagged and gave way, &c.

**Pleas.**—First: Not guilty. Second: That at the time of the supposed grievance the plaintiff did not of right enjoy, nor ought of right to enjoy, the said foundations of and supporting the said house and outbuildings.

At the trial, before *Byles*, J., at the last Stafford assizes, it appeared that the plaintiff was the owner of a house and outbuildings, situate to the east of a lane called Bill Hay Lane, but not adjoining to it, inasmuch as a garden and lawn, belonging to another owner, lay between the plaintiff's premises and Bill Hay Lane, and adjoined them on the

opposite sides. The plaintiff's house had been built in 1834 on solid ground. Between 1828 and 1831 coal had been gotten by one Jesson from under that part of the garden and lawn which adjoined the lane, but not up to the plaintiff's premises. Ribs and pillars of coal were at that time left to support the surface. In 1838 Jesson began to work the coal on the west side of Bill Hay Lane, leaving a rib of coal against the lane. In 1846 "crownings in" took place in the lawn and garden. In working the thick coal in Staffordshire, it is the practice to get out a certain quantity of coal in the first instance, leaving what are called ribs, to prevent water and air from coming in from adjoining mines, and pillars to support the surface. The pillars are eight yards square, the intervals between them eight yards in width. When the coal is worked out between the pillars, the mines are left for some years that the earth may settle. During this time it sometimes happens that in some places droppings of earth continually take place from the roof between the pillars, and by degrees the surface falls in, causing a basin shaped hollow on the surface; this is called "a crowning in." After the soil has become consolidated the mine is again worked, and the ribs got out as far as possible. In 1854 the defendant, who was then the owner of the mines on the west side of Bill Hay Lane, began to work out the ribs and pillars left by Jesson in 1838. The nearest of the defendant's workings were at a distance of thirty-five yards from the plaintiff's house. In 1857 the plaintiff's house began to crack. The plaintiff's witnesses alleged that the damage was caused by the getting of the ribs and pillars by the defendant on the west side of Bill Hay Lane. There was evidence that the defendant knew of the excavations on the east side of the lane.

The learned Judge asked the jury.—First, was the sinking of the plaintiff's premises caused by the defendant's

1859.

BROWN

v.

ROBINS.

1859.

BROWN  
v.  
ROBINS.

workings, either alone or in conjunction with anything else? The jury answered this question in the affirmative.

Secondly.—Would the same damage have arisen from the defendant's workings if the ground had been left solid on the east side of Bill Hay Lane? The jury found that it would not; but that some of the damage would have happened.

Thirdly.—Did the plaintiff enjoy, as of right, support from the defendant's ribs and pillars? His lordship said that the plaintiff's house was built in 1834. The excavations on the east side of Bill Hay Lane were finished in 1831, and therefore existed for twenty years when the defendant's workings began in 1854. If the defendant knew of the excavations on the east of Bill Hay Lane, the plaintiff had enjoyed as of right for twenty years the support of the defendant's soil. The jury found that the defendant did know of the excavations.

Fifthly.—Did the land fall from the superincumbent weight of the house, or would it have fallen if no house had been erected upon it? The jury found that the land would have fallen in the same manner whether there had been a house upon it or not.

Sixthly.—If the damages arose partly from the defendant's workings, and partly from the old workings to the east of Bill Hay Lane, how much was occasioned by the defendant's workings and how much by the old workings? The jury found 300*l.* damages, 250*l.* occasioned by the defendant's workings, and 50*l.* partly by the defendant's workings and partly by the old workings to the east of the lane. Upon these findings the learned Judge directed a verdict to be entered for the plaintiff for 300*l.*, reserving leave for the defendant to move to enter a verdict or to reduce the damages to 250*l.*; neither party to be at liberty to bring error.

*Huddleston*, in Michaelmas Term, obtained a rule to shew cause why the verdict should not be entered for the defendant upon the plea of not guilty, so far as relates to the allegations that the defendant worked carelessly and negligently, on the ground that those allegations were not supported by the evidence ; and on the second issue, on the ground that the plaintiff had not enjoyed, as of right, for twenty years, the right of support for his buildings from the ribs and pillars of coal worked by the defendant ; that there was no evidence nor was it found by the jury that the defendant, or those under whom he claimed, knew for twenty years that the plaintiff's premises were in fact supported by the mines worked by the defendant ; or why the damages should not be reduced to 250*l.*, on the ground that as to 50*l.* the damage was not occasioned by the defendant's working, but by the "crownings in" on land adjoining the plaintiff's premises ; or why a new trial should not be had on the ground of misdirection, namely, that the learned Judge should have directed the jury that no right of support from the ribs and pillars of coal west of Bill Hay Lane worked by the defendant was gained for the plaintiff's buildings, unless the defendant, or those under whom he claimed, knew for twenty years that, in consequence of the excavated state of the mines east of Bill Hay Lane, the plaintiff's buildings were in fact being supported by the said ribs and pillars, and that there was no evidence of such knowledge, and that, as the plaintiff did not establish a right of support for his buildings from defendant's ribs and pillars, the damages were excessive in respect of any supposed injury to the plaintiff's land.

*Gray* and *Scotland* now shewed cause.—The first objection is that there was no evidence that the defendant had worked the coal carelessly or negligently. But that is only

1859.

BROWN  
v.  
ROBINS.

1859.

*BROWN*  
v.  
*ROBINS.*

material if the plaintiff was not entitled to the support of the defendant's soil. [*Watson*, B., referred to *Smart v. Morton* (a). *Phipson* abandoned the first point.] As to the second point. The plaintiff's house was completed in 1835. The damage complained of was done more than twenty years after the plaintiff's house had been erected upon its present foundations. [*Martin*, B.—In *Rowbotham v. Wilson* (b) *Williams*, J., points out that the right of support is a right of property, not an easement. *Pollock*, C. B.—Has a person any right to dig so near to the land of his neighbour as to disturb his soil, whether there is a house there or not?] Suppose a person builds a house at the extremity of his land, which has been excavated, after twenty years he gains a right of support for its foundations: *Partridge v. Scott* (c). [*Martin*, B.—It is difficult to understand how an easement can be gained by acquiescence under such circumstances.] Thirdly, it is said that there was no evidence that the defendant knew of the extent of the excavations in the plaintiff's land. He knew that there were excavations, and his first duty in excavating his own land was therefore to leave a rib to prevent the plaintiff's land from being affected by his working. It was not necessary for the learned Judge to leave to the jury whether the defendant knew for twenty years that the plaintiff's house was enjoying the support of the defendant's land, because if the house had stood for twenty years he was bound to take notice of the fact. Fourthly, it is said that if there was no right of support for the house the damages were excessive. But the jury found that the weight of the house did not contribute to the accident. In *Gale on Easements*, p. 225, it is said:—"It may be suggested that there are cases in which, though the house be modern,

(a) 5 E. &amp; B. 30.

(b) 8 E. &amp; B. 123.

(c) 3 M. &amp; W. 220.

damages may be recovered for an injury done to it by digging too near the common boundary. If the owner establishes his right to support for his soil, and the jury should be of opinion that the land would have fallen in, in consequence of the digging, even had no additional weight been imposed by building, the value of the house falling with the land might, it seems, be recovered as damages resulting from the principal injury." In *Jeffries v. Williams* (a) *Parke*, B., pointed out that that is in accordance with 2 Roll. Ab. tit. "Trespass," (I), pl. 1. In *Jeffries v. Williams* (a) the declaration was held good though it alleged no right of support for the house. In *Roberts v. Haines* (b) an action was brought to recover damages for injuries by mining to houses, some of which had stood for twenty years, some less. It was objected that the houses which had not stood twenty years had not acquired a right to support, and that therefore the plaintiff was not entitled to damages for the injury to them. *Cresswell*, J., asked the jury whether the land would have fallen in if houses had not been built upon it, whether, in fact, they thought the weight of the houses had in any way caused the sinking of the ground. The jury found that the land would have sunk whether the houses were there or not. Upon which the learned Judge told them that the plaintiff was entitled to damages to the extent of the injuries to all the houses. Here the plaintiff had a right to the support of the defendant's land. The defendant took away a portion of the minerals which gave the support. Being entitled to this support, and having been deprived of it, the plaintiff is just as much entitled to damages for the injury to his house

1859.

BROWN  
v.  
ROBINS.

(a) 5 Exch. 792. *Watson*, B., referred to *The Earl of Lonsdale v. Littledale*, 2 H. Bl. 267.

(b) At Nisi Prius, not reported on this point. See 6 E. & B. 643; 7 E. & B. 625.

1859.

—  
BROWN  
v.  
ROBINS.

as he would have been to the value of a horse which might have been killed by the sinking of the soil. As to reducing the damages by 50%. If the defendant had not worked his mines so as to deprive the plaintiff's land of support, no damage at all would have happened from the old workings.

*Phipson* and *Dowdencell* (with whom was *Huddleston*), in support of the rule.—Two questions were put by the learned Judge which are material with reference to the second issue: First, suppose all was solid to the east of Bill Hay Lane, would the plaintiff's buildings have sustained damage? The jury said Yes, but not to the same extent. Secondly, did the land fall in consequence of the superincumbent weight of the building, or would it have fallen just the same whether the building was there or not? The answers to these questions do not decide the second issue in favour of the plaintiff. In consequence of the excavations under the garden, the plaintiff's land required support by a greater portion of the defendant's land than it otherwise would have required. It may be admitted that a man cannot dig a hole immediately adjoining his neighbour's land so as to let it in. Here, however, the excavation was at a distance, and the land was enjoying a sort of secret support. A person cannot, by taking away the natural support of his own land, create rights against his neighbour. The defendant is entitled to have the second issue found for him. [*Martin*, B.—I think you have failed in raising it.] The plaintiff was bound to shew that he was entitled to support by twenty years' enjoyment, because this is a case of support by adjacent land.

POLLOCK, C. B.—This rule must be discharged. As to the right of support for the house quâ house, if necessary

to decide it, which it is not, I should be disposed to hold that the plaintiff was entitled to the support of the surrounding ground. But the moment the jury found that the subsidence of the land was not caused by the weight of the superincumbent buildings, the existence of the house became unimportant in considering the question of the defendant's liability. It is as if a mere model stood there, the weight of which bore so small a proportion to that of the soil as practically to add nothing to it. The plaintiff's complaint resolves itself into this, that the land was injured; and the house was considered by the learned Judge solely with reference to the amount of the damages. Then it is said that the same amount of damage would not have happened if the land to the east of Bill Hay Lane had been left solid. If the excavation to the east of Bill Hay Lane contributed to the damage, did the defendant know that this ground was riddled by mines? The jury found that he knew it. He knew there was greater danger of injuring the plaintiff by sinking on the west side of the lane than there would have been if the ground on the east side had been left solid, and he ought to have known that the excavated ground was less powerful and gave less support on that side. He is therefore responsible for the whole of the damage. The objections upon which the rule was founded are answered in every part, and the rule must therefore be discharged.

MARTIN, B.—I am of the same opinion. The rule was obtained on several grounds. First, that there was no evidence of negligence on the part of the defendant. It was admitted that this fails because, if the plaintiff was entitled to the support of the defendant's land and was deprived of it, the absence of negligence is immaterial. Secondly, that

1859.

BROWN

v.

ROBINS.

1859.  
BROWN  
v.  
ROBINS.

the support was not enjoyed as of right. The mode in which the question was dealt with shews that this issue was properly decided in favour of the plaintiff. There was ample evidence that the defendant knew the state of the plaintiff's land. There is no ground for reducing the damages. The house was lawfully on the plaintiff's land, and was damaged by the unlawful act of the defendant. As to the point that no right of support by the defendant's ribs and pillars had been acquired, unless the defendant knew that in consequence of the excavated state of the plaintiff's ground his buildings were in part supported by these ribs and pillars, and there was no evidence of such knowledge, I think there was ample evidence. I do not wish to consider that as a criterion of the defendant's liability; but it was so treated.

WATSON, B.—When the report of the learned Judge was read, it became clear that there was no ground for this rule. It was alleged that there was no evidence that the defendant had worked carelessly; but the meaning is that he worked carelessly with reference to the rights of the plaintiff. The defendant desired to raise a question as to the right of support by adjacent land. When a great weight is put on land which immediately causes a pressure upon the adjoining land, a nice question sometimes arises; but here everything was determined, by the finding of the jury, that the accident was not caused by the weight of the building, and that this weight had no effect in causing the subsidence of the soil. As to the damages, the jury found that the defendant, knowing the state of the plaintiff's land, worked his own mines and so caused the injury. There is, therefore, no ground for reducing the damages.

CHANNELL, B.—The learned Judge left certain questions

to the jury. The findings, which are not impeached, taken in connection with the questions, appear to me to leave no room for the argument attempted to be raised on the part of the defendant.

1859.  
BROWN  
v.  
ROBINS.

Rule discharged.

---

### MEMORANDUM.

In the present Term *Hunter Rodwell*, Esq., of the Middle Temple; *G. M. Giffard*, Esq., of the Inner Temple, and *Henry Hawkins*, Esq., of the Middle Temple, were appointed her Majesty's Counsel.

## HILARY VACATION, 22 VICT.

1859.

Feb. 12.

FARMER and Others v. SMITH.

In September, 1845, a Benefit Building Society was established under the 6 & 7 Wm. 4, c. 32. By the Rules of the Society a subscription of 10s. a share per month was payable from September, 1845, until the objects of the

**T**HIS is an action brought by the plaintiffs, who at the time of the making and entering into the indenture hereinafter set forth were, and still are, the trustees of a Benefit Building Society called "The British Building and Investment Company," established under the statute 6 & 7 Wm. 4, c. 32, to recover from the defendant, as an alleged member of the Society and also the alleged holder of four shares of and in the Society, the sum of 4*l*. for two monthly sub-

Society were fully accomplished. One of those objects was the formation of a fund from which money might be advanced to the shareholders to enable them to purchase freehold or leasehold property; and they were declared to be entitled to receive the sums mentioned in certain tables. One of these tables stated the amount which a shareholder was entitled to receive on each share for thirteen years, viz. 60*l*. during the first year, 120*l*. at the end of the thirteenth year, and sums varying between them in the intermediate years. The rules also declared that the advance should be secured by a mortgage, and that if any shareholder should be desirous of satisfying the security he should be at liberty to do so, "by paying the subscription that would have become due on the shares advanced, *up to the end of the thirteenth year*:" also, that when the sum of 120*l*. for each unadvanced share, with all the expenses and liabilities of the Company, should be fully realized, the Society should terminate. In June, 1851, the defendant, who was the owner of four shares, received an advance of 280*l*., and executed a mortgage deed in which he covenanted to pay the subscriptions and interest payable on his shares according to the rules of the Society. By the 6 & 7 Wm. 4, c. 32, s. 5, an indorsement on the mortgage of the monies thereby secured vacates the same.

The Society sustained losses, and at the end of the thirteenth year there was not sufficient funds to pay the unadvanced shareholders 120*l*. a share.

*Held*: First, that the defendant was entitled to redeem his property in July 1858 (the thirteen years not terminating until the following September); but that, notwithstanding such redemption, his liability to the payment of the monthly subscriptions continued so long as there was not realized 120*l*. per share for the unadvanced shares.

Secondly, that the covenant in the mortgage deed extended to the payment of the subscriptions subsequent to the thirteen years, and might be sued upon although the security was vacated.

scriptions and interest due and payable by him on the said shares, being the monthly subscriptions due from him as such alleged member of the Society in the months of September and October last, according to the rules of the Society; and this action is brought against the defendant upon his covenant to pay such subscriptions and interest in the indenture hereinafter set forth. By consent of the parties and order of a Judge the following case was stated for the opinion of the Court:—

In September, 1845, the said British Building and Investment Company was established and duly enrolled as a Benefit Building Society under the statute 6 & 7 Wm. 4, c. 32; and the rules of the Society were duly certified to be in conformity to law and with the provisions of the said statute.

By the first rule of the Society, “The monthly subscriptions shall become due on the first Thursday in the month;” and “the first subscription shall be due in September, 1845.”

Rule 2.—“The object of this Company is by payments of its shareholders to form a fund from which money may be advanced to enable them to purchase freehold or leasehold property; and for this purpose every shareholder shall be entitled to receive out of the funds of the Company the sums mentioned in Table L for every share he may subscribe for, and so on in proportion for any fractional part of a share.”

The Tables were as follows:—

1859.

FARMER  
v.  
SMITH.

1859.  
FARMER  
v.  
SMITH.

TABLE I. Shewing the amount Shareholders are entitled to receive on each Share they may hold, for building or purchasing property.		TABLE II. Shewing the amount Shareholders are entitled to receive on each Share if they withdraw from the Company.		TABLE III. Shewing the Discount to be allowed on payments made in advance.	
	To be advanced on each Share.		Having paid in	May draw out	
During the 1st year 2nd 3rd 4th 5th 6th 7th 8th 9th 10th 11th 12th 13th	£ s. d.	At the end of the	£	£ s. d.	£ s. d.
	60 0 0	1st year	6	6 3 3	0 0 0
	61 0 0	2nd	12	12 12 6	0 0 1
	63 0 0	3rd	18	19 7 9	0 0 2
	66 0 0	4th	24	26 9 6	0 0 8
	70 0 0	5th	30	33 16 3	0 1 6
	74 0 0	6th	36	41 9 6	0 2 6
	78 0 0	7th	42	49 8 9	1 0 6
	82 0 0	8th	48	57 14 0	3 15 7
	87 0 0	9th	54	66 5 3	6 8 3
	92 0 0	10th	60	75 2 6	11 7 7
	99 0 0	11th	66	84 5 9	15 5 6
	108 0 0	12th	72	93 15 0	
	120 0 0	13th	78	120 0 0	
		In addition to the above sums, the Directors may from time to time award a bonus on the withdrawal of Shares, the amount of which bonus will depend on the degree of success experienced by the Company.		The Discount Table has been calculated for every month in the thirteen years, viz. from 1 to 156.	
				N.B.—The foregoing Tables are used with the permission of Mr. J. R. Macarthur, by whom they were constructed, and the copyright in which is protected by Entry at Stationers' Hall.	

Rule 2 also provided that "the subscriptions shall be 10s. per month per share. Every shareholder shall, at the first subscription meeting, commence paying his or her subscription money, or sum of 10s. per share, for each and every share he or she may hold, and shall afterwards continue paying the said subscription money of 10s. per share per month, with all fines that may be due from him or her, at every succeeding monthly meeting, or at latest before the third Monday or Thursday in every month, until the objects of the Company shall be fully accomplished."

Rule 3.—"As the funds of the Company accumulate, the manager or secretary shall from time to time send notice to the shareholder next in rotation on the list for advances, informing him when he may receive the advance for which he has so given notice; and within two months after the day named in such notice the shareholder shall take up such advance, giving security according to Rule 9."

Rule 6.—"Any shareholder who shall be desirous of withdrawing from this Company any share or shares on which he or she has not received an advance, shall be allowed to do so on giving one month's notice, in writing, of his or her intention to the Board for the time being, at any monthly meeting of the Company; and shall receive on each share the sums mentioned in Table II. If more than one shareholder shall give notice to withdraw at one time, they shall be paid in rotation, according to the priority of notice."

Rule 9.—"When any shareholder shall be entitled to receive his or her share or shares pursuant to Rule 3, he or she shall give notice of the nature and situation of the premises intended to be offered for the security thereof to the manager or secretary; and he shall forthwith transmit the same to the Survey Committee or the surveyor, who shall, within seven days after the receipt thereof, examine

1859.

FARMER

v.  
SMITH.

1859.

FARMER  
v.  
SMITH.



the premises mentioned in such notice and make a report thereon. When the Board or Survey Committee shall be satisfied that the premises so to be offered as aforesaid are a sufficient security to the Company, they shall direct the trustees to pay to such shareholder the sum or sums of money which he or she shall be entitled to receive, on such members executing such a mortgage of such premises as the solicitor of the Company shall require, and depositing the same and all other necessary title deeds relating thereto with the trustees as a security to the said Company for so much money as shall be therein expressed to be secured; and the trustees shall make such payments accordingly. In the said mortgage to be executed upon the advance of any money in respect of any share or shares so purchased as aforesaid, it shall be provided, that in case the shareholder taking the same shall at any time thereafter neglect or refuse for three monthly meetings to pay, observe and perform all or any of his or her subscriptions, payments and regulations, on his or her part respectively to be paid, observed and performed, then the trustees for the time being shall have the power to appoint a person or persons to collect the rents and profits of the premises therein mentioned. But should the same be insufficient to satisfy the purposes aforesaid, then the trustees should likewise have the power, without the concurrence or consent of the said shareholder, absolutely to sell and dispose of all or any part of the said premises by public auction (and in case no public sale can be effected, then by private contract,) for the most money that can be had for the same; or, with the consent of the shareholder, by private contract in the first instance; and shall receive the purchase money arising therefrom, with liberty at such public sale, by themselves or one of them, or some other person appointed by them or him in writing, to buy in the same on behalf of

the Company, and to resell the same without being answerable for any loss to be occasioned by such resale : and also for enabling the trustees out of the money to arise from such collection of rents and profits or such sale as aforesaid, in the first place to discharge all costs, charges and expenses which may be incurred on account of such collection of rents, or sale or sales, or in anywise relating to the trusts therein contained ; and in the next place, shall retain and reimburse themselves and the said Company all such principal money, subscriptions, and other payments as shall then be due, owing, and payable by such shareholder under and by virtue of these rules and the aforesaid mortgage. And the money so retained for the said Company shall be immediately deposited with the Company's bankers, to the account of the trustees, for the use and benefit of the Company ; and they shall and will pay the surplus, if any, arising from such sale or collection of rents to the said shareholder, or to such other person or persons as he or she shall, by writing under his or her hand, direct or appoint to receive the same."

Rule 10.—"Whenever the funds of the Company are not claimed by the shareholders for advances according to Rule 3, and there shall be to the credit of the Company at their bankers a sum equal to the average amount of two months' subscriptions beyond the liabilities of the Company, the Board shall appoint a ballot to take place among all the shares then unadvanced ; and the person or persons whom the ballot shall determine as the person or persons liable to take the share or shares so to be balloted for, shall take the same according to Table I. ; but in no case shall any person be compelled to take at one ballot, when shares are balloted for, more than one quarter of a share. And whenever any shareholder shall neglect or refuse to give security for such one fourth part of a share which he or she

1859.

FARMER  
v  
SMITH.

1859.

FARMER  
R.  
SMITH.

shall be liable to take in pursuance of the ballot, he or she shall withdraw such one fourth part of a share pursuant to Table II. Any shareholder having taken the one fourth part of a share in pursuance of the ballot, or having withdrawn the same, shall not again be liable to the ballot for or in respect of such share, until every other share, liable as aforesaid, shall have been balloted for. The ballot shall have application to the number of each share unadvanced, and not to individuals. Any shareholder upon whom the ballot falls shall have the privilege of taking the whole or any part of the funds so balloted for, which may then be at the bankers, as an advance pursuant to Table I., provided he gives notice to the manager of his intention to do so within fourteen days next after such ballot."

Rule 21.—"If any shareholder, having received an advance on any share or shares and secured the repayment thereof upon his or her premises, shall sell such premises, it shall be lawful for the purchaser to take the same, chargeable with the debt due to the Company; and the purchaser shall thenceforth become answerable to the Company for the payment of the subscriptions and other charges as the same shall become payable; and the trustees shall, at the request and cost of such shareholder, release him or her from all future liability in respect of such share or shares, if they see no objection. If any shareholder in this Company, who shall have received his or her share or shares, or any of them, shall be desirous of paying and satisfying the security or securities which shall have been given for the same, he shall be at liberty to do so, by paying to the directors the subscriptions that would have become due on the shares advanced on such property up to the end of the thirteenth year of this Company, and shall be allowed on such payments discount at four per cent. per annum. And in payment thereof together with

all fines due in respect of such shares, the board shall direct the trustees to deliver all deeds and other documents in their custody relating to the security to the shareholder, and at his or her cost to indorse a receipt (a) or acknowledgment on such mortgage, according to the 6 & 7 Wm. 4, c. 32, s. 5."

Rule 32.—"When it shall appear by the books of the Company that there is sufficient to pay each unadvanced share 120*l.*, then all arrears of subscriptions, fines and other payments shall become due and shall be payable immediately, and the trustees shall enforce the payment as before expressed in these Rules."

Rule 33.—"When the sum of 120*l.* for each unadvanced share, with all other expenses and liabilities of the Company, shall be fully realised, the accounts shall be finally audited, printed, and sent to each shareholder, and the Company terminate; and the trustees, with the advice of the solicitors of this Company, shall deliver up to each shareholder, or his or her legal representatives, the title deeds and other documents which shall have been deposited with them by such shareholder as a security to this Company; and shall and will, at his or her request or expense, indorse on his or her mortgage a receipt for all the monies intended to be secured thereby, pursuant to the 6 & 7 Wm. 4, c. 32, s. 9. And that then three fourths

(a) The form of receipt, given in an Appendix to the Rules, was as follows:—

"FORM OF RECEIPT TO BE INDORSED UPON MORTGAGES."

*By virtue of the Act 6 & 7 Wm. IV., cap. 32, sec. 5.*

We, the undersigned, being the trustees for the time being of the within mentioned British

Building and Investment Company, do hereby acknowledge to have received of and from the within-named his heirs, executors, administrators or assigns, all monies intended to be secured by the within-written deed. As witness our hands.

Dated the      day      184 .

"(The above form is to be altered as occasion may require.)"

1859.

FARMER

v.  
SMITH.

1859.

FARMER

v.  
SMITH.

in number of the shareholders present at any meeting specially convened by giving seven days' notice to each member shall have full power to declare this Company at an end, and all accounts thereof be finally closed; and such resolution shall be effectual at law and in equity as a release from all the shareholders."

In June, 1851, the defendant was a member of the said Society, and held four shares in the Company; and thereupon he became entitled to an advance of money in respect of such shares to the amount of 280*l.*; and such sum was accordingly advanced to him according to the rules of the Company. When such advance was made, the defendant delivered the said four shares to the secretary of the Company on behalf of the Company, who thereupon made on each an indorsement as follows:—

"Memorandum—Within five years of the British Building and Investment Company, the sum of 70*l.* was received by Mr. William Smith, being the full amount to be paid by the Company on this share. No further sum will at any time be receivable from the Company on this share by any person who may hereafter become the holder thereof."

The defendant executed an indenture of mortgage, dated the 24th of June, 1851. This indenture, which was made between the defendant of the one part and the plaintiffs of the other part, was (so far as material) as follows:—

"Whereas by an indenture of lease bearing date the day of                    1851, made between R. De Beavoir of the first part, for the considerations therein mentioned, the said R. De Beavoir demised and leased unto the said W. Smith (the defendant) all that piece or parcel of ground, with the messuage thereon, erected &c., for the full end and term of seventy two years and one half of another year, to be computed from Lady Day then last, at the yearly rent of 3*l.*, subject to the covenants therein contained. And whereas

a Society, called The British Building and Investment Company, has been formed for the purpose of raising by subscription a fund to assist the members thereof in obtaining freehold or leasehold property, pursuant to an Act (6 & 7 Wm. 4, c. 32); and the rules have been made for the government of the said Society, and certified, allowed, confirmed and enrolled. And whereas the sums of money to be contributed by subscription in respect of each share in the funds of the said Society amount to the sum of 120*l.*, and the said W. Smith is, according to the said rules, entitled to receive out of the said funds thereof, by way of anticipation, the sum of 280*l.* in respect of his shares, numbered &c. in the books of the said Society, upon his entering into the security hereinafter mentioned. And whereas the said W. Farmer, &c. (the plaintiffs) are the trustees duly appointed of the said Society. Now this indenture witnesseth, that in consideration of the sum of 280*l.* sterling to the said W. Smith now paid by the said W. Farmer, &c., as such trustees as aforesaid, out of the funds of the said Society, the receipt whereof is hereby acknowledged, in pursuance of the said rules, the said W. Smith doth grant, bargain, sell and demise unto the said W. Farmer, &c., their executors, &c., All that piece or parcel of ground situate &c., on part whereof one messuage or tenement hath lately been erected &c., which said piece or parcel of ground and the dimension thereof are more particularly delineated and described in the plan drawn in the margin of the said indenture of lease, with all ways, &c.: To have and to hold the said hereditaments unto the said W. Farmer, &c., their executors, &c., from Lady Day then last past for the residue of the said term of seventy two years and the half of another year wanting two days, without impeachment of waste, at the rent of a peppercorn, if demanded. Nevertheless, upon trust from time to time, so long as the said

1859.

  
FARMER  
v.  
SMITH.

1859.

FARMER

v.

SMITH.

W. Smith, his executors, &c., shall duly make the several payments, and observe and perform the regulations prescribed in the articles of the said Society in respect of the said shares, and also perform all the covenants herein contained, to be made, observed and performed, to permit him or them to hold the said premises and receive the rents and profits thereof for his and their benefit; but if he or they should at any time hereafter fail to perform and keep all or any of the said covenants, or shall at any time hereafter neglect or refuse for three monthly meetings to pay, observe and perform all or any of his or her subscriptions, payments and regulations on his or her part respectively to be paid, observed and performed, then upon trust at any time thereafter for the said W. Farmer, &c., their executors, &c., or the trustees for the time being of the said Society, to appoint a person or persons to collect the rents and profits of the said premises; but should the same be insufficient to satisfy the purposes aforesaid, then, without the concurrence of the said W. Smith, his executors, &c., absolutely to sell and dispose of all or any part of the said premises by public auction (and in case no public sale can be effected, then by private contract), &c., and out of the monies to arise from such collection of rents and profits or such sale as aforesaid, in the first place to discharge all costs &c. which may be incurred on account of such collection of rents and profits or such sale or sales as aforesaid, or in any wise relating to the trusts hereby reposed in them or him, &c.; and in the next place to retain and reimburse themselves or himself respectively, in trust for the said Society, all sums of money which shall be due and which may afterwards become due and payable by the said W. Smith, his executors, &c., in respect of the said shares in the said Society, by virtue of the rules aforesaid, or otherwise howsoever; it being hereby agreed by the parties hereto that

in case such sale as aforesaid shall take place, all monies which could at any time afterwards have become due from him or them, according to the subsisting rules of the Society, shall be considered as then actually due; and the same, or so much thereof as may be lawfully demanded, shall be fully deducted and paid out of the money received by virtue of the aforesaid powers or trusts; and upon trust to pay the residue (if any) of the said trust money unto the said W. Smith, his executors, &c. And the said W. Smith doth *covenant* with the said W. Farmer, &c., and their successors, trustees for the time being of the Society, that he the said W. Smith, his heirs, executors, &c., shall and will pay the subscriptions and interest payable on his said shares, according to the rules of the Society, on the days and in manner therein mentioned, and abide by and perform the rules thereof in respect of the said shares."

1859.

FARMER

v.

SMITH.

The plaintiffs acting for and on behalf of the Company, and the Company, have acted upon the 21st Rule, and have permitted the holders of advanced shares to redeem the same and to pay and satisfy the securities thereon held by the plaintiffs in trust for the Company, and the same have been satisfied by payment of such subscriptions as would have become due on such shares from the time of such redemption thereof up to the thirteenth year of the Company, and of all charges thereon: and such practice prevailed as late as the month of February, 1858, after which the plaintiffs refused to act on the 21st Rule.

The manager of the Company absconded in the month of April last, having embezzled considerable sums of money; but before that time and prior to the month of February, 1858, the Company had suffered considerable losses.

In July, 1858, the defendant duly gave notice to the plaintiffs and to the Company, according to the said rules, that he was desirous of paying and satisfying the above

1859.

**FARMER**  
**v.**  
**SMITH.**

mentioned security so granted by the defendant to the plaintiffs; and that he was ready and willing to pay to the directors of the Company all such subscriptions as would become due on the said advanced shares up to the end of the thirteenth year of the Company, and all lawful claims and charges in respect thereof; and requested the directors to direct that the aforesaid indenture of mortgage should be returned to him according to the said rules; but this the directors of the Company refused to do.

In August, 1858, the thirteenth year of the Company ended; but the funds of the Company were not then, nor are they now, sufficient to realise 120*l.* per share.

The plaintiffs, as trustees of the Society, contend that the Society will not under the aforesaid circumstances terminate, according to the Rules thereof, until the full sum of 120*l.* for each unadvanced share, with all the expenses and liabilities of the Society, shall be fully realised by means of such payments of the shareholders as are by the said Rules required to be made; and that the defendant is bound, notwithstanding the termination of the thirteenth year of the Society, he being then and still, as the plaintiffs contend, a member thereof, to pay the said subscriptions on the said shares and to continue to pay the same according to the Rules of the Society, on the days and in manner therein mentioned, and abide by and perform the Rules thereof in respect of the shares until such termination of the said Society as last aforesaid. The defendant says, that in July, 1858, when he gave notice to the plaintiffs of his desire to redeem, and also at the expiration of the thirteenth year of the Society, he having paid up all his subscriptions and interest according to the said indenture of mortgage and Rules of the Society, and in every respect complied with the same, is entitled to have all the title deeds relating to the premises comprised in the said inden-

ture of mortgage delivered up to him and the security satisfied, and a receipt for all the monies payable to the Society by virtue of the said indenture and secured thereby, indorsed thereon by the plaintiffs as the trustees of the Society.

The questions for the opinion of the Court are: first, whether, upon the facts stated, the defendant was entitled to redeem his property so mortgaged as above. Secondly, whether the plaintiffs are entitled to recover from the defendant, upon the said indenture, the sum of money claimed in the action, or any part thereof, for his aforesaid subscriptions and interest.—If the Court shall be of opinion that the defendant was not entitled to redeem, or that the plaintiffs are entitled to recover from the defendant the said sum of money, then judgment shall be entered for the plaintiffs for the sum of 4*l*. If the Court shall be of a contrary opinion, then judgment, with costs of defence, shall be entered for the defendant.

*Knowles* (*Beazley* with him) argued for the plaintiffs in Hilary Term (Jan. 28).—This Society was established under the 6 & 7 Wm. 4, c. 32, which, after reciting that certain Societies, commonly called Building Societies, have been established in different parts of the kingdom, and that it is expedient to afford protection and encouragement to such Societies, provides that any number of persons may form themselves into Societies for the purpose of raising, by the monthly or other subscriptions of the members, shares not exceeding the value of 150*l*. for each share, such subscriptions not to exceed 20*s*. per month for each share, a stock or fund for the purpose of enabling each member thereof to receive out of the funds of such Society the amount or value of his shares, “to erect or purchase one or more dwelling-house or houses, or other real or leasehold

1859.

FARMER

v.  
SMITH.

1859.  
  
 FARMER  
 v.  
 SMITH.

estate, to be secured by way of mortgage to such Society until the amount or value of his or her shares shall have been fully repaid to such Society, with the interest thereon," &c. The Act then provides for the making of rules and regulations for the government and guidance of such Societies. Section 2 enables any such Society to receive from any member thereof any sum of money by way of bonus on any share for the privilege of receiving the same in advance prior to the same being realised. So that the Act recognises two classes of members, viz., those who do not receive the value of their shares until the termination of the Society, and those who receive an advance on their shares. By section 5, the trustees may indorse upon the mortgage a receipt for the monies thereby secured, which shall vacate the same, and vest the estate in the person entitled to the equity of redemption. By Rule 1 of this Society, the first subscription was due in September 1845. Rule 2 defines the object of the Society, and provides that every shareholder shall be entitled to receive on his shares the amount mentioned in Table I. (a). According to that table, he would during the first year be entitled to an advance of 60*l.* a share, though he might have paid less than 6*l.*; but if he did not receive any advance he would at the end of the thirteenth year (at which period it was calculated that the Society would terminate) receive 120*l.*, having paid 78*l.* Rule 2 also provides, that every member shall continue paying his subscription money of 10*s.* a month until the objects of the Company shall be fully accomplished. Therefore, whether the objects of the Company are accomplished in thirteen years, or not until a longer period, every member must go on paying his subscription. Rule 3 points out the mode of obtaining an advance. By Rule 6, a shareholder may withdraw any share on which he has not received an

(a) *Antè*, p. 198.

advance: so that a member who has received an advance on his shares must continue a shareholder, since he has got by anticipation all the benefit which he would have had at the termination of the Society. Rule 9 relates to mortgages in respect of advances, which must contain a provision that, in case the shareholder shall neglect or refuse to pay his subscriptions, the trustees may appoint a person to collect the rents of the mortgaged premises, and, if they are insufficient for the purpose, to sell the premises. By Rule 21, if any shareholder who has received an advance sells the mortgaged premises, the purchaser takes the same chargeable with the debt due to the Company, but the shareholder is not released unless the trustees see no objection. That rule also provides, that if a shareholder who has received advances shall be desirous of satisfying the security, he may do so by paying the subscriptions that would have become due on the shares advanced *up to the end of the thirteenth year*, and shall be allowed a discount on such payments. It is said that the effect of this provision is, not only to enable the shareholder to redeem his mortgage, but also to discharge him from all future liability as a member of the Society. Such a construction is at variance with the other parts of the Rule; and, if the provision be so read, it is not authorized by the 6 & 7 Wm. 4, c. 32. The words "up to the end of the thirteenth year" must be construed with reference to the other Rules, and as governed by the words "if the objects of the Company shall be fully accomplished." By Rule 22, when it shall appear by the books of the Company that there is sufficient to pay each unadvanced share 120*l.* all arrears of subscriptions shall become due and the trustees shall enforce payment. By Rule 33, when the sum of 120*l.* for each unadvanced share shall be realised, the Company shall terminate; and three-fourths of the members shall have power to declare the

1859.

FARMER

v.

SMITH.

1859.  
 FARMER  
 v.  
 SMITH.

Company at an end. The mortgage deed contains an express covenant that the mortgagor will pay his subscriptions according to the Rules of the Society ; and by those Rules a shareholder who has received an advance cannot withdraw, but must pay his subscriptions until sufficient is realised to pay the unadvanced members 120*l.* each. There are several authorities upon the question whether the defendant is entitled to redeem his mortgage. In *Mosley v. Baker* (a) the plaintiff filed a bill in equity to redeem certain premises which he had mortgaged to a Building Society, of which he was a member, as a security for money advanced upon his shares, and the question was, upon what terms was he entitled to redeem. Sir *J. Wigram*, V. C., there pointed out that the principle on which these Societies proceed in making advances to their members is, not that of a mere loan to a stranger upon a security, but an advance, at the then present or conventional value of the member's interest in the share which he would otherwise only receive at the termination of the Society, and that, having received it by anticipation, he could only redeem upon payment of his subscriptions up to the time of the probable duration of the Society. On appeal, that decision was affirmed by Lord *Cottenham* (b). Again, in *Seagrave v. Pope* (c), Lord *Truro* held (reversing the decision of *Knight Bruce*, V. C.), that such an advance to a member was not a loan, but an anticipatory payment, by way of discount, of the shares he would otherwise have been entitled to at the termination of the Society, and that the mortgage was to secure his subscriptions until that period ; and that he was not entitled to redeem upon the terms of repayment of the advance, minus the amount of subscriptions paid by him up to the notice to redeem. There the mortgage deed con-

(a) 6 Hare, 87.

(b) 1 Hall & Twells, 301.

(c) 1 De Gex, M'N. & G. 783.

tained no covenant for repayment of the money advanced. *Fleming v. Self* (a) is an authority that, if the provisions in the mortgage deed are inconsistent with the Rules, the intention of the parties must prevail; and it was evidently the intention that the members should continue to pay their subscriptions until 120*l.* was realised for each unadvanced share.

1859.

FARMER  
v.  
SMITH.

*Wilde* (*W.G. Harrison* with him), for the defendant.—First, the defendant is entitled, under the 21st Rule, to redeem his mortgage security on payment of his subscriptions up to the end of the thirteenth year of the Society, and, having done that, he ceases to be a member of it. Secondly, even if he does not cease to be a member, there is no power to sue him upon the indenture. The parties agreed to pay a certain monthly subscription for each share during the existence of the Society. They contemplated that it would last thirteen years, and they made provision for its termination at the end of that period. They calculated that the amount received from subscriptions and fines would, at the end of thirteen years, produce sufficient to pay each member 120*l.*, but, if the Society were prosperous, it might terminate earlier. There is a provision that shareholders may receive, by way of advance, a sum equivalent to that which they would be entitled to at the end of thirteen years. This Society differs in that respect from those in the cases referred to. There the advance share was put up by auction and knocked down to the member who was the highest bidder for it; here the shareholder requiring an advance is entitled to a certain fixed sum calculated upon the number of years he would have to pay his subscription. Thus, in the first year he would be entitled to an advance of 60*l.*, in the fifth year of 70*l.*, and in the eleventh of 99*l.*; but in each case he is bound to pay his subscription up to the end of

(a) 3 De Gex, M'N. & G. 997.

1859.  
 FARMER  
 v.  
 SMITH.

the thirteenth year. The sum advanced and the sum to be paid are correlative and regulated by the time of payment. There is likewise a provision for shareholders withdrawing from the Society, and the sums which in such case they are entitled to receive are also calculated for a period of thirteen years. A member who has drawn out his money is not liable to pay any further subscriptions. So, where a member has received advances, there is a provision for redemption which discharges him from further liability. In *Mosley v. Baker* (a) no definite time was fixed for the termination of the Society; but it was to continue until the shares were of the value of 120*l.* each. In *Fleming v. Self* (b), the directors resolved that the Society might be expected to terminate in eleven years, and that this term should be the basis on which to calculate the liabilities of members desirous of withdrawing. Here there is an express provision for redemption on payment of the subscriptions that would become due on the shares advanced up to the end of the thirteenth year. Therefore a member entitled to redeem may get rid of his liability to pay his subscriptions for the remainder of the thirteen years by the payment of one sum. [*Martin, B.*—The members agree to pay their subscriptions until a fund is raised sufficient to realise 120*l.* for each share. Some of them get a prepayment of what they would ultimately be entitled to, but that does not release them from their obligation to pay until the fund is raised.] It was competent to the parties to agree that a future liability might be bought up, and they have stipulated that an advance shareholder shall be free from future liability on payment of his subscriptions up to the end of the thirteenth year. An advance shareholder who redeems can never derive any benefit from the success

(a) 6 Hare, 87; S. C. affirmed  
 on appeal, 1 Hall & Twells, 301.

(b) 3 De Gex, M'N. & G.  
 997.

of the Society, and he must pay his subscription for thirteen years. When he receives the advance, he agrees to accept a less sum instead of his 120*l.* share, and when he redeems he pays his subscription in advance. It may be that the Society is prosperous, and that in ten years, or a less time, sufficient is realised to pay each unadvanced member 120*l.*, but the redeeming member can derive no benefit: whilst the former would have to pay their subscriptions for ten years only, the latter on redeeming must have paid a sum equal to his subscriptions for thirteen years. In *Fleming v. Self* (a) it was held that the redeeming member was entitled to a share of the profits. There, Lord *Cranworth*, C., said:—"When an unadvanced member withdraws from the Society, it is reasonable that he should receive back, not only the principal sums which he has contributed, but also, by way of bonus, a portion of the benefit which those sums have gained for the Society. \* \* \* But the condition on which an advanced member redeems (which is in truth withdrawing) is very different. The rule which gives him, on redeeming, the same sum, under the name of 'profits,' as is given to an unadvanced member withdrawing, appears to be hardly reasonable. Still, the question to be decided is, not whether the provision is fair and just, but what is the meaning of the rule. If the meaning is clear, it is the duty of the Court, if possible, to give it effect." Here, the mortgage being on the terms that if the advanced member does not pay his future subscription the Society may sell the mortgaged premises, the provision that, when he redeems by payment of his subscriptions, &c., the mortgage deed shall be returned to him affords strong evidence that it was never intended that he should be under any further obligation to pay. The language of the 21st Rule is, "if any shareholder shall be desirous of satisfying the security,"

1859.

FARMER  
v.  
SMITH.

(a) 3 De Gex, M'N. & G. 997.

1859.  
 FARMER  
 v.  
 SMITH.

&c.—that is, the security for the performance of his obligation to pay the subscriptions, &c., “he shall be at liberty to do so,”—that is to get rid of the security and consequent obligation by paying the subscriptions up to the end of the thirteen years. Under the power of sale in the mortgage deed, one of the trusts is for payment to the Society of all monies due, or to become due, in respect of the advanced shares by the Rules of the Society. [*Watson, B.*—No argument can be drawn from the power of sale, for it might be exercised after the thirteenth year.] The intention was to deprive the redeeming member of all chance of profit, and to relieve him from all liability. By the 21st Rule, the mortgage deed must be delivered up with a receipt indorsed upon it, according to the 6 & 7 Wm. 4, c. 32, s. 5, which receipt vacates the mortgage and vests the property in the person entitled to the equity of redemption. Therefore no action can be maintained on the mortgage deed, for the covenants are at an end. The remedy, if any, is by application to a justice of the peace under the 10 Geo. 4, c. 56, s. 21. [*Martin, B.*, referred to *Crisp v. Bunbury (a)*.]

*Knowles*, in reply.—This Society could never terminate before the end of thirteen years. It is founded on a calculation that at that period enough would be realised to pay the unadvanced members 120*l.* a share; but, from losses or other causes, that might not be possible until several years afterwards. This is a mutual benefit society: the 60*l.* received by the advanced member in the first year, and the 70*l.* in the fifth year, is an equivalent to the 120*l.* to be received by the unadvanced member at the end of the thirteenth year. The advanced member, having received all the benefit which he bargained for, is bound to pay his subscriptions until the other members have received the

(a) 8 Bing. 394.

same. The Rules shew that the intention was that the subscriptions should be paid until the object of the Society was fully accomplished, that is, until the unadvanced shareholders received 120*l.* a share. In *Seagrave v. Pope* (a) Lord *Truro*, C., said: By the 16th Article, "a person who has not had any advances made to him may withdraw from the Society and receive back his subscription, subject to a certain forfeiture. But that does not afford any good reason for contending that a person who has had an advance may withdraw on repayment of such an advance. The party to whom a liberty of withdrawal is given by the 16th Article has not received anything from the Society, but the Society have had the use of his subscriptions. But the member who, by the advance made to him, has had his share discounted, as it were, is under an obligation to pay and make the monthly payment for which the share was awarded him." Though the security contained in the mortgage deed is vacated by the indorsement of the receipt, the covenants in the deed are not thereby released. There is no remedy under the 10 Geo. 4, c. 56, s. 27. [*Channell*, B., referred to *Cutbill v. Kingdom* (b).]

1859.

FARMER  
v.  
SMITH.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

MARTIN, B.—This is a special case for the opinion of the Court. In September, 1845, a Benefit Building Society was duly established under the statute 6 & 7 Wm. 4, c. 32, called "The British Building and Investment Society," and its Rules were lawfully certified. This action is brought, upon a covenant hereafter mentioned, to recover from the defendant 4*l.*, being the monthly subscriptions upon four shares, alleged to be due from him to the Society for the

(a) 1 De Gex, M'N. & G. 783.

(b) 1 Exch. 494.

1859.

FARMER  
v.  
SMITH.

months of September and October, 1858. In June, 1851, the defendant was a member of the Society and owner of four shares, and was, according to the Rules of the Society, entitled to, and received, 70*l*. on each share, amounting to 280*l*. This sum was paid to him, and a memorandum was indorsed on each of the shares, to the effect that the defendant had received from the Society the full amount to be paid on these shares, and that no further sum should at any time thereafter be receivable from the Society upon them. At the same time the defendant executed an indenture by way of mortgage, dated the 24th June, 1851, containing the covenant upon which this action is brought. This indenture was made between the defendant and the plaintiffs, and recited that the defendant was lessee for a long term of years of some land, *and that the sum of money to be contributed by subscription in respect of each share in the above Society amounted to 120*l*.; and that the defendant was entitled to receive out of the fund by way of anticipation 280*l*. in respect of his shares, upon entering into the security thereafter mentioned. The indenture then witnessed that, in consideration of 280*l*. paid to the defendant out of the funds of the Society in pursuance of the rules, the defendant granted, &c. to the trustees the said land: To have and to hold &c. for the residue of the said term wanting two days; upon trust, so long as the defendant made the payment in respect of the said shares, to permit him to hold the premises and receive the rents, but if he failed and neglected for three monthly meetings to pay his subscription, then upon trust for the plaintiffs, or the trustees of the Society, to appoint a receiver and to sell the property, &c. The indenture then contained the covenant upon which this action is brought; viz. "that the defendant should and would pay the subscriptions and interest payable on his shares according to the rules of the Society, on*

*the days and in manner therein mentioned, and abide by and perform the rules in respect of the said shares."* Previous to the month of February, 1858, the Society had sustained considerable losses, and in April of that year the manager absconded, having embezzled considerable sums of money. In July, 1858, the defendant duly gave notice that he was desirous of satisfying the above mortgage security, and that he was ready to pay all such subscriptions, &c. as would become due on his shares up to the end of the thirteenth year of the Society, and requested that the indenture of mortgage should be returned to him; but this the trustees refused to do. In August, 1858, the thirteenth year of the Society ended, but the funds were not and are not sufficient to realise 120*l*. for each unadvanced share. The case then states the points respectively contended for between the parties to the action, and the two questions for the opinion of the Court :—First, Whether the defendant was entitled to redeem his property so mortgaged as above. Secondly, Whether the plaintiffs are entitled to recover from the defendant upon the indenture the sum of money claimed in this action.

For the purpose of determining these questions, it is necessary to consider with care the real nature and objects of this Society, and the contracts and liabilities of its members to be ascertained from its Rules. By Rules 1 and 2, the first subscription, 10*s*. per share, was to be due in September, 1845, and the future subscriptions, being 10*s*. per share per month, were to be continued to be paid by every shareholder until the objects of the Society were fully accomplished.

By Rule 2, one object of the Society was declared to be the formation of a fund from which money might be advanced to the shareholders, and every shareholder was declared to be entitled to receive out of the fund the sum

1859.

FARMER  
v.  
SMITH.

1859.

FARMER

v.  
SMITH.

mentioned in Table I. (a) for every share subscribed for. This Table is stated to have been constructed by Mr. Macarthur. And Table L states the amount the shareholder is entitled to receive on each share for thirteen years, viz. 60*l*. during the first year, 120*l*. during the thirteenth, and sums varying between them in each intermediate year. Table II. shews the amount a withdrawing shareholder is entitled to receive at the end of any year; and Table III. is a discount Table. Another object of the Society, as shewn by Rules 32 and 33, is that every shareholder who has received no advance upon his share shall receive 120*l*.; for the 33rd Rule declares that when the sum of 120*l*. for each unadvanced share, with all the expenses and liabilities of the Company, should be fully realised, the Society shall terminate, and the trustees shall deliver up to each shareholder who has received an advance, the title deeds deposited with them as security, and indorse on the mortgage a receipt for all the money secured thereby, pursuant to the 6 & 7 Wm. 4, c. 32, s. 5, which operates as a reconveyance of the land mortgaged, and that then, by a resolution of three fourths of the members, the Society may be declared to be at an end; and this resolution shall be a release from all the shareholders at law and in equity.

There were therefore to be two classes of shareholders. First, the shareholders who receive an advance. A shareholder of this class has received all the benefit proposed by the Society. He was deemed to be in the same position as those who receive 120*l*. at the termination of the Society. During the first year he was entitled to 60*l*., although he has only paid 6*l*., perhaps not so much; and during the fifth year he was entitled to 70*l*., although he had only paid 30*l*.; but, having received all the benefit, he is bound to pay his subscription to the termination of the

(a) *Antè*, p. 198.

Society: he can no longer withdraw from it (Rule 6). And this is quite just; for having received the whole benefit he is in justice bound to contribute until all receive an equal benefit. The indorsement made upon the defendant's shares was therefore quite correct; when he received 70*l*. per share he received all which could ever be receivable from the Society upon them.

1859:  
  
 FARMER  
 v.  
 SMITH.

The second class of shareholders consists of those who hold shares unadvanced upon. These are entitled to 120*l*. (Rule 33); and whenever there was sufficient to pay them 120*l*. per share the second object of the Company was accomplished, and the Society was to be terminated; but until this was attained, and the object of the Company thereby fully accomplished, all the shareholders were bound to continue to pay their monthly subscriptions of 10*s*. per share (Rule 2). It was supposed that the period of thirteen years from the commencement of the Company had something to do with this; but it clearly has not. According to the Tables (*a*), the calculation of Mr. Macarthur was (we presume calculating upon some given rate of interest) that there would be 120*l*. at the end of the thirteen years for every share, assuming that no shareholder had taken an advance at all. But the success of the Society depends upon whether the sum of 120*l*. per share for the unadvanced shares is realised within or beyond the thirteenth year; if within the thirteen years (say in ten years) there had been funds to pay the unadvanced shareholders 120*l*. per share, the Company would have been at an end and the adventure successful. The shareholder, in respect of each share unadvanced upon, would receive 120*l*.; and the holder of the share advanced on would be relieved from the payment of all further subscriptions. The unadvanced shareholders would get their 120*l*. per share, the share-

(*a*) *Antè*, p. 198.

1859.

**FARMER**  
**P.**  
**SMITH.**

holders advanced to would be relieved from the payment of further monthly subscriptions, and the land mortgaged as security be released and reconveyed by means of the receipt and the operation of the 6 & 7 Wm. 4, c. 3, s. 5.

But if at the end of thirteen years there were not funds sufficient to pay to the shareholders, in respect of each share unadvanced upon, 120*l.* per share, the Company would not have terminated; it becomes an unsuccessful one; and, according to the 2nd and 33rd Rules, all the shareholders were bound to continue paying their monthly subscriptions until the 120*l.* on each unadvanced share was realised. This is perfectly clear, and we have no doubt that, according to the Rules, the defendant is liable and bound to pay 10*s.* per share for the months of September and October, 1858, being the two months next succeeding the expiration of the thirteen years from the commencement of the Society.

If we are right as to the meaning of the Rules, there does not seem to be much difficulty in answering the questions proposed. The 3rd Rule prescribes the mode of obtaining the advance; the 9th, the security to be given by the shareholder. The security given by the defendant for his advance of 280*l.* is the mortgage before mentioned, which seems to have been in conformity with the Rule. The 21st Rule prescribes how the shareholder is *to redeem his property in mortgage*. The third paragraph declares that if a shareholder, who shall have received his share, shall be desirous of paying and satisfying the security which he shall have given, he shall be at liberty to do so by paying the subscription which would have become due on the share advanced on such property up to the end of the thirteenth year of the Company, and shall be allowed discount on such payment at 4*l.* per cent.; and on payment thereof, &c., the board shall direct the trustees to deliver

to the shareholder all deeds relating to the security, and at the shareholder's costs indorse a receipt on such mortgage, according to the 6 & 7 Wm. 4, c. 32, s. 5. The form of the receipt (a) is given in the appendix, and purports to be a receipt of all monies intended to be secured by the deed; but this memorandum is subscribed—"The above form may be altered as occasion may require." The 5th section of the statute is to the effect that a receipt for the money intended to be secured by the mortgage shall vacate it and vest the estate in the person entitled to the equity of redemption without it being necessary to execute a reconveyance.

1859.

FARMER  
v.  
SMITH.

The true meaning of the 21st Rule seems clear. The parties contemplated that at the end of the thirteenth year at the furthest all the objects of the Company would be accomplished: want of success was not contemplated; the state of things which now exists, viz. losses and embezzlement, was never thought of; if it had been, the 21st Rule might possibly have been framed in a different manner: but we have to deal with it as it is, and it seems to us that, according to his contract, the defendant was entitled to redeem his property in mortgage at any time within the thirteenth year by paying his subscription up to the end of that year. This was his bargain, and he is, in our judgment, entitled to the benefit of it, and to redeem his property at the time he professed to do so.

Our answer to the first question therefore is, that the defendant was entitled to redeem his property in mortgage in the month of July, 1858, the thirteen years not terminating until September. Some cases were cited, but it is only necessary to refer to one, *Fleming v. Self* (b), in which Lord *Cranworth* lays down the principle upon which we act, viz. that the real question is, what is the meaning of

(a) *Antè*, p. 203.

(b) 3 De G. M'N. &amp; G. 997.

1859.

**FARMER**  
**v.**  
**SMITH.**

the rule? If the meaning be clear, it is the duty of the Court to give effect to it. But it was argued on behalf of the defendant that this would relieve him from his liability to pay the subscription upon his shares after the expiration of the thirteenth year. There is not a word to be found either in the act of parliament or the Rules to this effect; on the contrary, we think the Rules clearly shew that, notwithstanding the redemption of the property, the liability to the payment of the monthly subscriptions still continues so long as there is not realised 120*l.* per share for the shares unadvanced upon.

The second question is this: Does the covenant contained in the indenture as above stated extend to the payment of the subscription subsequent to the thirteen years, or must the Society have recourse to their remedy upon the Rules? We are of opinion that the covenant does so extend; in its terms it clearly does. The advance was obtained upon the security of the mortgage in which it is so contained. The consequence of the advance was that the shareholder obtaining it became liable to pay his subscription to the termination of the Society, without the power to withdraw; and we think we further the true spirit of the covenant by holding it to bind the defendant to pay his subscriptions according to the Rules at the days and in the manner therein provided, until the termination of the Company.

It was said that the mortgage deed must be delivered up to the defendant with a receipt indorsed upon it, in pursuance of the 6 & 7 Wm. 4, c. 32, s. 5. This may be so; but the section, though it provides that the receipt therein mentioned shall be sufficient to vacate the mortgage, and vest the estates of and in the property comprised in the security in the person entitled for the time being to equity of redemption, and without the necessity for a reconveyance,

it does not provide that all the covenants in the deed shall be deemed to be released or extinguished, or that the deed itself is to be considered as cancelled. We think that a copy of the deed may be taken and preserved; that the covenant to pay the subscriptions is a personal covenant not necessarily extinguished by the operation of the 5th section, and that the plaintiffs are entitled to recover on such covenant the sum claimed in this action.

1859.

FARMER

v.

SMITH.

Judgment for the plaintiffs.

## COLLINS v. CAVE.

Feb. 12.

**T**HE declaration stated that, before the commission of the grievances hereinafter mentioned, the plaintiff, the defendant and one Charles Collins had entered into a joint speculation and adventure in and relating to certain shares, to wit the shares of and in a certain railway called the Paris and Strasburg Railway; and the said C. Collins had advanced the sum of 6000*l.* for the purposes of such

A declaration alleged that the plaintiff, defendant and C. had entered into a joint speculation in railway shares: that C. had advanced 6000*l.*; 2000*l.* on his own behalf, 2000*l.* as a loan

to the plaintiff, and 2000*l.* on behalf of the defendant: that C. was desirous of retiring from the adventure, and the defendant offered to take upon himself the whole of the adventure and debt of 6000*l.*, provided the plaintiff would consent to abandon his share to the defendant, and C. would accept the defendant as his debtor in the place of the plaintiff for the said sum of 2000*l.*; that the plaintiff did abandon his share of the adventure to the defendant, and the defendant agreed to take upon himself the whole adventure and become debtor to C. for the whole 6000*l.*, and C., on the faith and in the belief that such an arrangement was made, consented to accept the defendant as such debtor in the place of the plaintiff. Nevertheless, the defendant knowing that he alone was capable of proving that the plaintiff had assented to the said arrangement, fraudulently, falsely, and maliciously, and before the Evidence Act, 14 & 15 Vict. c. 99, and in order to induce C. to believe that the said joint adventure had never been put an end to, and to induce C. to sue the plaintiff for the 2000*l.*, and to deter the plaintiff from calling the defendant as a witness, and to destroy his credit as a witness, if so called, wrote and sent to C. a letter, purporting to be addressed to the plaintiff but directed to C., wherein he fraudulently and falsely pretended to expostulate with the plaintiff, and asserted that the plaintiff had positively refused to concur in the said arrangement. By means whereof C. was induced to and did believe that the plaintiff had never agreed to retire from the said adventure, and, acting on such behalf, C. brought an action against the plaintiff to recover the 2000*l.*: that the said action was referred to an arbitrator, upon the terms that neither the plaintiff nor the defendant should be examined; and C. recovered against the plaintiff 2,486*l.*, which he was compelled to pay.—*Held*, that the declaration disclosed no cause of action, since it did not appear that the damage to the plaintiff was a natural result of the wrongful act of the defendant.

1859.

COLLINS  
v.  
CAVE.

adventure, 2000*l.* on his own behalf, 2000*l.* on behalf of and as a loan to the plaintiff, and 2000*l.* on behalf of the defendant; and the plaintiff had given to the said C. Collins security for the said sum of 2000*l.* so advanced on his behalf and as such loan as aforesaid. That after such advance and such security so given as aforesaid, the said C. Collins was desirous of retiring from the said adventure, and applied to the defendant to effect such retirement for him, and to procure some other party to undertake the share and risk of him the said C. Collins therein. That the defendant then offered to take upon himself the whole of the adventure and take upon himself the whole of the debt of 6000*l.*, provided the plaintiff would also consent to abandon his share in the adventure to the defendant and the said C. Collins would accept the defendant as his debtor in the place of the plaintiff for the said sum of 2000*l.* so advanced on behalf of the plaintiff as aforesaid. That the plaintiff did so consent to abandon, and did abandon, his share of the said adventure to the defendant, and the defendant had due notice thereof, and agreed thereupon to take upon himself the whole adventure, and become debtor to the said C. Collins for the whole said sum of 6000*l.*, including the said sum of 2000*l.* so advanced on behalf of the plaintiff as aforesaid, and informed the said C. Collins thereof; and the said C. Collins, on the faith and in the belief of such an arrangement having been bonâ fide made, consented to accept the defendant as such debtor, and to accept him as his debtor in the place of the plaintiff for the sum of 2000*l.* so advanced on behalf of the plaintiff as aforesaid, and did abandon and give up to the defendant his share in the said adventure; and thereupon the plaintiff became and was wholly released from and no longer liable to the payment of the said sum of 2000*l.* to the said C. Collins or upon the said security. Neverthe-

less the defendant, well knowing, as the fact was, that he himself was then alone capable and possessed the only means of proving at law, as between the plaintiff and the said C. Collins, that the plaintiff had assented to the arrangements above mentioned and agreed to abandon his share of the said adventure, fraudulently, falsely and maliciously, and before the passing of a certain act of parliament made and passed &c. (14 & 15 Vict. c. 99), intituled "An Act to amend the law of evidence," in order to induce the said C. Collins to believe that the said joint adventure had never been put an end to, and that the plaintiff had never agreed to retire therefrom or assented to the agreement lastly hereinbefore mentioned, but that the plaintiff and the defendant had conspired together and falsely represented to the said C. Collins that such was the case; and to induce the said C. Collins to harass and vex the plaintiff, and to sue the plaintiff for the said 2000*l.*, and to deter the plaintiff from calling the defendant as a witness for the now plaintiff in such action, and to destroy his credit as a witness if so called, wrote a certain letter, dated the 29th day of June, 1848, purporting to be addressed to the plaintiff in the inside thereof, but directed on the outside to the said C. Collins, and sent the same to the said C. Collins, wherein and whereby he fraudulently and falsely pretended to expostulate with the plaintiff, and asserted that the plaintiff had positively refused to concur in the arrangement above mentioned or to abandon his share in the said adventure, but insisted on retaining his third proportion thereof as originally agreed. By means whereof, and on no other account and for no other reason whatever, the said C. Collins was induced to and did believe that the plaintiff had never agreed to retire from the said adventure nor assented to the last mentioned agreement being put an end to; and in and acting on such

1859.

COLLINS

v.

CAVE.

1859.

COLLINS

v.  
CAVE.

belief and upon the contents of the said letter, and not knowing or having reason to believe otherwise, the said C. Collins did, before the passing of the said Act, commence an action against the plaintiff in her Majesty's Court of Exchequer at Westminster to recover the said sum of 2000*l.* and interest. And the plaintiff says that he, at the commencement of such action, knew of such letter and of the conduct of the defendant, and of the effect thereof upon the said C. Collins; and that the said action was, before the passing of the said Act, by order of the said Court, referred to the arbitrament, order and disposition of F. Robinson, Esq., barrister at law, deceased; but upon the terms that neither the plaintiff nor the defendant should be examined before the said arbitrator; and such proceedings were thereupon and therein had, that by the judgment of the said Court the said C. Collins recovered against the plaintiff the sum of 2486*l.* 8*s.* 6*d.*, and the plaintiff was forced and compelled to pay such last mentioned sum, and was also put to great expense, to wit the sum of 500*l.*, for his own costs and charges by him expended in and about the said action and reference.

Demurrer and joinder therein.

*Montague Smith* (*Milward* with him) argued in support of the demurrer in last Hilary Term (Jan. 24).—The declaration discloses no cause of action. The damage is not the legal and necessary consequence of the alleged wrongful act. The declaration states that the defendant wrote a letter purporting to be addressed to the plaintiff but directed to Collins, in order to induce Collins to sue the plaintiff; but it is not shewn that there was any transfer of the plaintiff's debt to the defendant, so as to discharge the plaintiff from his liability to Collins. The declaration also states that the defendant wrote the letter to induce Collins to believe

1859.  
 COLLINS  
 v.  
 CAVE.

that the plaintiff had never agreed to retire from the adventure, and to deter the plaintiff from calling the defendant as a witness, if Collins brought an action against the plaintiff. But the act of Collins in bringing the action was his individual act: he might or might not have brought it. Then, the action having been brought, it is referred upon the terms that neither the plaintiff nor the defendant should be examined before the arbitrator, and the result was that Collins recovered against the now plaintiff. It is not, however, shewn how that result was obtained; nor does it appear whether the now plaintiff was examined or not, or whether he set up any defence to the action, or in what way the result of that action is connected with the alleged wrongful act. [*Martin, B.*—You say that if a man falsely and maliciously induces another to bring an action against a third person, and he does so and recovers wrongfully, that gives no cause of action.] The bringing an action is not a wrongful act, and the law presumes that a person who recovers recovers rightfully. *Cotterell v. Jones*(a) was an action against two persons for conspiring together, maliciously and vexatiously and without reasonable or probable cause, to commence, and commencing, an action against the plaintiff in the name of a pauper, but for their own benefit; and it was held that an action for so conspiring would not lie, there being no allegation of legal damage resulting to the plaintiff therefrom. *Jervis, C. J.*, there said:—“Where an *action* is wrongfully brought the costs which the party gets are a compensation for the wrong: but in criminal cases there are no costs.” It seems doubtful whether that action could have been maintained, even if there had been an allegation of legal damage. [*Pollock, C. B.*—If an action could be maintained for maliciously suing, I do not know when litigation would end:

(a) 11 C. B. 713.

1859.

COLLINS

v.  
CAVE.

the next step would be an action for maliciously subpoenaing a witness. *Martin, B.*—An action for maliciously suing would involve a trial whether the judgment in the former action was right.] There is no instance of an action of this kind in which the termination of the former suit was not in favour of the defendant. In *Haddan v. Lott* (a) the declaration alleged that the plaintiff had petitioned for a patent for a certain invention, and that the defendant falsely, fraudulently, maliciously and wrongfully, and without reasonable or probable cause, represented to the Solicitor General that he had an interest in opposing the grant of letters patent to the plaintiff; alleging as special damage that by reason of the premises the Solicitor General refused to allow the plaintiff's application to proceed, and he was thereby prevented from obtaining a patent for his invention and was put to expense in opposing a grant of letters patent to the defendant. On demurrer, it was held that the special damage did not necessarily flow from the alleged grievance.—He also referred to 2 Smith's Lead. Cas. 425.

*Lush* (*C. Pollock* with him), contra.—It is an established principle, that where a person makes a representation wilfully false with intent to injure another, who thereby sustains damage, he may maintain an action in respect of it. Here the declaration alleges a false and malicious representation by the defendant whereby the plaintiff was injured. [*Pollock, C. B.*—Suppose a person, knowing that an action is about to be brought, tells the plaintiff's attorney that he can prove his case, but when the trial comes on he says that he can prove nothing; and he does this maliciously and for the purpose of putting the plaintiff to costs.] That would be within the principle that if any one knowingly tells a falsehood with intent to induce an-

(a) 15 C. B. 411.

other to do an act which results in his loss, he is liable to that person in an action for deceit. In *Gerhard v. Bates*(a) a count stated that the defendant and others had formed a Company on a principle known as a *Société Anonyme*, with 96,000 shares of 1*l.*, of which 12,000 were to be appropriated to the public at 12*s.* 6*d.* per share, free from further calls: that the 12,000 shares were actually offered to the public: that the defendant, being a promoter and managing director, intending to defraud, deceive and injure the public, and to cause it to be publicly advertised that the Company was likely to be a safe and profitable undertaking, and to deceive the public who might become purchasers of the 12,000 shares, and induce them to become purchasers, falsely, fraudulently and deceitfully caused it to be publicly advertised, by a prospectus issued by the defendant as such director, that the promoters did not hesitate to guarantee to the bearers of the 12,000 shares a minimum annual dividend of 33 per cent., and that the guarantee should remain in force till the 12*s.* 6*d.* should be thus repaid to the shareholders: that the defendant, by means of the said false, fraudulent and deceitful pretences and representations, wrongfully and fraudulently induced the plaintiff to become, and the plaintiff by reason thereof actually became, the purchaser of 2500 of the 12,000 shares at 12*s.* 6*d.*: whereas the statement was false and fraudulent to the knowledge of the defendant, and the defendant had no ground for offering such guarantee to the public, as he well knew: by means of which the plaintiff lost the money paid for the shares. It was held that the damage to the plaintiff was sufficiently shewn to be the direct result of the defendant's fraud, to entitle the plaintiff to recover against the defendant. Lord *Campbell*, C. J., in delivering

1859.

COLLINS

v.

CAVE.

(a) 2 E. &amp; B. 476.

1859.  
 COLLINS  
 v.  
 CAVE.

the judgment of the Court, said:—"This count is founded on a deceitful representation, not on contract. Now we consider it clear law that, if A. fraudulently makes a representation which is false, and which he knows to be false, to B., meaning that B. shall act upon it; and B., believing it to be true, does act upon it and thereby suffers damage, B. may maintain an action on the case against A. for the deceit; there being here the conjunction of wrong and loss entitling the injured and suffering party to a compensation in damages: Com. Dig. Action upon the Case for a Deceit (A 9), (A 10)." [*Watson, B.*, referred to *Levy v. Langridge (a)*.] In that case the Court of Exchequer Chamber affirmed the judgment of the Court below on the ground that, as there was fraud, and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud was responsible to the party injured. [*Watson, B.*—That principle was recognised in *Longmeid v. Holliday (b)*. *Pollock, C. B.*—The case of a simple lie, where the party is under no obligation to tell the truth, gives no cause of action.] It is otherwise where the lie is told with the intention that it should be acted on by the party injured, and damage thereby accrues to him. *Pasley v. Freeman (c)* established this broad principle, that a false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. And that in such action it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is. [*Martin, B.*—In *Polhill v. Walter (d)* the doctrine

(a) 4 M. & W. 337.

(b) 6 Exch. 761.

(c) 3 T. R. 51.

(d) 3 B. & Adol. 114.

was carried to the utmost extent. The subject was also discussed in *Fuller v. Wilson* (a), which was followed up by *Ormrod v. Huth* (b).] In *Barley v. Walford* (c) it was held that the declaration shewed a cause of action, it appearing that the defendant had knowingly uttered a falsehood with the design to deprive the plaintiff of a benefit and acquire it to himself, and the damage naturally flowing from the plaintiff's belief. Here the declaration discloses not only a false affirmation by the defendant, and damage resulting therefrom to the plaintiff, but also a benefit to the defendant from his fraud. The case bears some analogy to an action for a malicious prosecution or a malicious holding to bail, only that such actions will not lie unless the former proceedings have terminated in favour of the original defendant; for, however malicious the motive may be, a person has a right to take legal proceedings, and it is only on their termination that it can be ascertained whether he was justified in doing so. It is conceded that no action will lie against a witness for perjury, whereby a party to the suit is damaged; but the reason is that the witness is protected by the law, on the same principle that he is protected from being sued for slanderous words uttered by him in giving evidence. [*Pollock*, C. B.—Must it not be taken that the finding of the arbitrator was correct?] Not as regards the defendant, who was no party to the action. Besides, the wrongful act was the inducing Collins to bring the action. In *Haddan v. Lott* (d) the Court gave no formal judgment, but merely an intimation of opinion. In *Cotterell v. Jones* (e) the declaration contained no allegation of legal damage resulting to the plaintiff from the wrongful act of the defendant, and the Court expressly forbore to

1859.

COLLINS  
v.  
CAVE.

(a) 3 Q. B. 58. 1009.

(b) 14 M. &amp; W. 651.

(c) 9 Q. B. 197.

(d) 15 C. B. 411.

(e) 11 C. B. 713.

1859.

COLLINS

v.  
CAVE.

determine whether the action would lie if there had been an allegation of damage.

*Montague Smith*, in reply.—There is no instance of an action like this, where the decision in the former action has been in favour of the defendant. The damage alleged is not the necessary consequence of the act of the defendant; for the arbitrator may have disbelieved the evidence on the part of the now plaintiff, or have given judgment against him on account of default of his own. [*Martin*, B., referred to Hammond's *Nisi Prius*, as an admirable work on the subject of torts.]

*Cur. adv. vult.*

The judgment of the Court was now delivered by

WATSON, B.—We are of opinion that the defendant is entitled to our judgment. The question arose on a demurrer to a declaration, which stated that the plaintiff and defendant and one Charles Collins were engaged in a purchase of railway shares, and Charles Collins had advanced 6000*l.* for the shares, of which 2000*l.* was a loan to the plaintiff: that Charles Collins being desirous of release from the speculation, the defendant had agreed with the plaintiff and Charles Collins to take upon himself the shares and obligation; and that the plaintiff was discharged from the same; and that plaintiff was released therefrom, and that defendant was the only witness to prove the agreement: That defendant maliciously and wrongfully before the Evidence Act came into operation, to induce Charles Collins to sue the plaintiff, and to believe that no such agreement was made, and to deter the plaintiff from calling the defendant as a witness and destroy his credit, wrote a letter purporting to be a letter to the plaintiff; but directed

and sent it to Charles Collins, by reason whereof Charles Collins brought an action against the present plaintiff; and that it was referred to the late F. Robinson, Esquire, barrister at law, on the terms that neither party should be called as a witness. That Mr. Robinson made an award against the now plaintiff. It was contended that this case fell within the principle, that where there is fraud and intention that a person should act upon it, and damage sustained thereby, an action lies: *Langridge v. Levy* (a). It was also contended that the case was of the nature of a malicious prosecution.

This action is certainly of the first impression, and we cannot see very well on what principle it is maintainable; for Charles Collins was a party to the agreement, and it is to be inferred he would know what agreement he entered into. There seems no doubt the defendant acted fraudulently in sending this letter to Charles Collins. The object as alleged is twofold: first, to induce Charles Collins to bring the action; and it is difficult to see that it is actionable to induce a third person to bring a wrongful action. Again, it is equally difficult to see how making the representation to neutralize his own evidence, and to deter the plaintiff from calling him as a witness, is a good cause of action, when an action could not have been maintained, as admitted in the argument, against the defendant if he had actually committed perjury to the damage of the plaintiff. Even if this case could be considered analogous, as argued, to an action for a malicious prosecution or malicious arrest, it would fail, as the suit is determined in favour of the defendant. These are serious objections to the cause of action as disclosed in the declaration; it is, however, not necessary to decide the case on these grounds, for we think it is not shewn by the declaration that the

1859.  
  
 COLLINS  
 v.  
 CAVE.

(a) 9 M. & W. 1.

1859.

COLLINS

v.  
CAVE.

damage alleged is the consequence of the alleged wrongful act of the defendant. It is not alleged, nor is it to be inferred from the allegations in the declaration, that Mr. Robinson's award was brought about by, or was the necessary consequence of, the alleged letter. In the first place the reference of the action with a proviso that neither party should be examined was the act of the plaintiff; when the plaintiff might have filed his bill in Chancery against Charles Collins for discovery, he might have refused to refer without the proviso that the plaintiff might be examined. It is not alleged that the defendant was not called as a witness in the arbitration, or that the facts were not admitted before Mr. Robinson, and he might have considered in law it was no binding agreement. Therefore our judgment must be for the defendant.

Judgment for the defendant.

Feb. 3.

KEEN v. PRIEST.

Carr. colts and young stags, not broken in or used for harness or the plough, are not privileged from distress as beasts which graze the land.

In case of a distress by a landlord for rent due from his tenant, the sheep of an undertenant are privileged

if there are other goods upon the premises sufficient to satisfy the rent.

The owner of sheep, seized and sold under a distress for rent, which was minimal because there were other goods on the premises belonging to him which might have been distrained for the same rent, is entitled to recover from the distrainor, not merely nominal damages, but the full value of the sheep so seized.

**DECLARATION.**—That defendant took and distrained sheep of the plaintiff's of great value, then being in and upon certain land and premises, with the appurtenances, held by one J. T. Sellers as tenant thereof to the Earl of Mornington, not for damage feasant, but for certain rent then alleged to be due from J. T. Sellers to the said Earl, for and in respect of the said land, &c.: the estate of which said land was then used and rented by the plaintiff of the said J. T. Sellers, for the depasturing of the said sheep

of the plaintiff for a certain period which then had long to run, and which said sheep contributed to manure and till the said land and increase the eatage, &c.; and although there were then other goods and chattels, to wit of the plaintiff, there distrainable for the said rent in and upon the said land (not being beasts of the plough, nor other animals or chattels, or crops not distrainable by law), sufficient for a reasonable distress for the rent aforesaid, yet the defendant afterwards, to wit &c., sold the said sheep, and converted and disposed of the money arising from the sale thereof to the use of the defendant, contrary to the form of the statute, &c.—Second count: Trespass for taking sheep. Third count: Trover for sheep.

Plea, to the first, second and third counts: Not guilty.

At the trial, before *Bramwell*, B., at the last Essex Summer Assizes, it appeared that the plaintiff had purchased of Sellers the after-grass of certain marshes at Wanstead which were rented by Sellers of the Earl of Mornington, and that on the 8th of April, 1858, he had upon the marshes ninety-four sheep, some heifers, some young steers, not being beasts of the plough, and some unbroken cart colts. On the same day the defendant seized the sheep as a distress for 104*l.* rent due to the Earl, but the rent having been afterwards paid by Sellers, the defendant returned all the sheep except twelve, which he kept and ultimately sold to satisfy the costs of the distress. There was evidence that the heifers and steers were of considerably greater value than the amount of the rent and expenses, but it appeared that some of the cattle might have escaped into an adjoining field. It was admitted that, if the horses were distrainable, the plaintiff might have satisfied the rent without taking the sheep.

Upon these facts the learned Judge told the jury that in his opinion the horses were distrainable, but he asked them

1859.

KEEN  
v.  
PRIEST.

1859.

KEEN  
v.  
PRIEST.

whether there were cattle enough on the land, besides the horses, to satisfy a distress for 120*l.*, being the amount of the rent and a reasonable sum for expenses. The jury found that without taking the horses into account, there was not enough. The verdict was entered for the plaintiff for 15*l.*, the value of the sheep, leave being reserved to the defendant to move to enter a verdict or to reduce the damages to 1*s.*

*Bovill*, in Michaelmas Term (Nov. 10), moved accordingly.—The question, whether the horses were distrainable, depends upon the 51 Hen. 3, stat. 4, which enacts,—“Que nul home de religion ne auter soit distreine per ses beasts queux gainont son terre, ne par ses barbits, pur la det le roy, ne pur la det de auter home, ne pur auter encheson per les bailiffes le roy, ne per autres, tanque come il trove auters chateux sufficient dont ilz poient lever le det, ou que suffist sa demaund,” &c. (*a*). The words “queux gainont son terre,” in this statute, mean something more than beasts of the plough—in the *Articuli supra Chartas*, 28 Ed. 1, st. 3, c. 12, “bestes des charues” (*b*). It may well mean beasts which manure his land. In *Ducange’s Glossary*, the word *gagnagium* is defined, *Peculium agricolæ, quo nomine, comprehenduntur omnia tam jumenta, quam alia instrumenta, quæ ad cultum agrorum et fruges colligendas sunt necessaria* (*c*). [*Watson*, B.—Those statutes are only in affirmance of the common law.]—Secondly, though sheep are privileged from distress, that is only when they are the property of the tenant. There is no reason for the application of the rule to the case of sheep belonging to a stranger, and the

(*a*) See 2 Inst. 133.

(*b*) 2 Inst. 565.

(*c*) In Com. Dig. Distress (C.), it is said:—“Beasts of the plough, or which improve the land, as sheep

&c., shall not be distrained, if there be other sufficient distress,” referring to 51 H. 3; 2 Inst. 132; Co. Litt. 47 *a*.

language of the statute does not warrant it. The words are, "no man shall be distrained by his sheep." Thirdly, the plaintiff is only entitled to nominal damages, because he sustained no real injury by the defendant having distrained the sheep instead of the colts and steers.

*Cur. adv. vult.*

In the same Term (Nov. 15),

BRAMWELL, B., said.—The Court think that in this case there ought to be a rule upon the question whether the damages should have been merely nominal. With regard to the other point, whether the colts, steers and heifers were animals that gained the land, we are of opinion that they were not. In fact they were not capable of being used for that purpose at the time. As to the point whether the statute applies to the case of a sub-tenancy, the argument being that the words, "no man shall be distrained by his sheep," apply only in cases where the person distrained is the owner of the sheep, we think that fails, and that the statute applies in every case, whether there is an immediate tenancy between the occupier and the distrainer, or whether there be no immediate tenancy. On this point the rule must be refused. But there will be a rule to shew cause why the damages should not be reduced to one shilling.

Against the rule so granted,

*Hawkins* and *Malcolm* now shewed cause.—There is nothing to prevent the plaintiff from recovering the full value of the sheep. He has a verdict on the count in trover. In trover the damages are the value of the goods seized: *Finch v. Blount* (a), *Gillard v. Brittan* (b), *M'Leod v. M'Ghie* (c). It will be alleged that the defendant might

(a) 7 C. & P. 478.

(b) 8 M. & W. 575.

(c) 2 M. & G. 326.

1859

KEEN  
v.  
PRIEST.

have distrained the colts and cattle, and that if he had done so the plaintiff would have had no redress. But it is no answer to an action, or claim for damages for taking and detaining goods under an illegal warrant, that the goods might have been lawfully detained under a legal warrant. [*Watson*, B.—In a case on the Northern Circuit, for distraining a tenant's goods before sunrise, *Cresswell*, J., directed the jury that the plaintiff was entitled to the full value of the goods taken.] This is not an action for an irregularity in the distress, but for taking that which the plaintiff had no right to take at all. The plaintiff might have replevied and got back his sheep. [*Bramwell*, B.—In *Nargatt v. Nias* (a), the Court of Queen's Bench held that trespass lay for taking, under a distress for rent, tools of trade not in use, where there were other goods on the premises sufficient to satisfy the distress.]

*Bovill*, in support of the rule.—In the present case rent was due, and the defendant had a right to distrain. There were two descriptions of chattels on the premises, which the plaintiff was at liberty to seize. First, cattle; secondly, if the cattle were not of sufficient value, the sheep. The 11 Geo. 2, c. 19, s. 19, enacts that, "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the parties distraining, &c., the parties aggrieved, &c., shall recover full satisfaction for the special damage he, she or they shall have sustained thereby, and no more." The plaintiff sustained no real damage by the taking of the sheep instead of the colts and steers. [*Bramwell*, B.—The plaintiff might have rescued the sheep: Com. Dig. Distress (D. 5).] In *Proudlove v. Twemlow* (b), *Rodgers v. Parker* (c) and *Lucas v. Tarleton* (d), it was held that the

(a) 28 L. J., Q. B. 143.

(b) 1 Cro. &amp; Mee. 326.

(c) 18 C. B. 112.

(d) 3 H. &amp; N. 116.

measure of damages in actions for irregular distresses is the amount of injury sustained. In *Knight v. Egerton* (a), an action on the case for selling goods distrained for rent, without appraisement, it was held that the measure of damages was the value of the goods minus the rent. The sale in that case was wholly unlawful. In *Harvey v. Pocock* (b), where a landlord distrained for rent, amongst other things, goods which were not distrainable in law, as looms in work, there being sufficient without them to satisfy the rent, and the tenant paid the amount of the rent and costs of distress, upon which the distress was withdrawn, it was held that the tenant was entitled in an action of trespass to recover only the actual damage sustained by the taking of those goods.

1859.

KEEN  
v.  
PRIEST.

MARTIN, B.—The rule must be discharged. Sheep are not distrainable if there are other goods liable to distress, upon the premises; as in the present case there were other goods, the sheep might have been rescued. No authority has been produced to shew that the owner can only recover one shilling damages instead of the value of the sheep seized. It is a general rule, that if a man does an illegal act, he is responsible for the consequences of it. It is no answer to say that the defendant might have seized other goods. The plaintiff's sheep having been sold, he is entitled to recover their value.

WATSON, B.—I am of the same opinion. From the earliest period of our history, it has been the law that sheep are not distrainable, if there are other goods on the premises sufficient to satisfy the debt. The seizure was therefore wholly illegal. If the plaintiff had replevied, he would have been entitled to a return of the sheep. The defendant

(a) 7 Exch. 407.

(b) 11 M. &amp; W. 740.

1859.

KLEEN  
v.  
PRIEST.

never had any rightful possession of the sheep, therefore the case does not come within the 11 Geo. 2, c. 19. The cases cited for the defendant are cases where the distress was lawful, but the subsequent conduct of the distrainer was irregular.

BRAMWELL, B.—I entirely agree with the rest of the Court. The rule was granted after some hesitation. The act complained of was one of trespass. In trespass for taking goods, the measure of damages is the value of the goods.

Rule discharged.

Feb 12.

FLETCHER and ROSE v. THE GREAT WESTERN RAILWAY COMPANY.

A railway Company, having purchased land for the purpose of their railway by agreement, and having taken a conveyance in the form given in the Lands Clauses Consolidation Act, 1845, Schedule (A.), and not being willing to purchase the minerals after notice of the owner's intention to work

THIS was a special case stated by order of nisi prius.—The declaration stated, that the defendants were authorized to construct, and did construct a certain railway, called the Birmingham, Wolverhampton and Dudley Railway, by "The Birmingham, Wolverhampton and Dudley Railway Act, 1846:" that the plaintiffs were the owners of mines and minerals, in the county of Stafford, lying under the railway of the defendants, and within forty yards thereof, and were entitled to work and get the same, and were desirous of working the same; and that the plaintiffs, on the 19th of November, 1857, gave the defendants due notice in writing of their intention so to do after the ex-

them, pursuant to s. 78 of the Railways Clauses Consolidation Act, 1845, is not entitled to the adjacent or subjacent support of the minerals; but the owner is entitled to get them notwithstanding that the getting of such minerals would cause the surface to subside.—*Held*, accordingly, that where, under such circumstances, the Company had given notice that the working of the mines was likely to damage the works of the Company, the owner of the minerals was entitled to recover compensation which had been assessed under the 78th section.

piration of thirty days from the giving of such notice: that the defendants, on the 17th of December, 1857, gave notice to the plaintiffs, that it appeared to the defendants, that the working of a certain portion of the said mines and minerals, was likely to damage the works of the railway; and that the defendants were willing to make compensation for such portion of the said mines and minerals to the plaintiffs: that the plaintiffs and defendants did not agree as to the amount of such compensation: that the compensation claimed by the plaintiffs exceeded 50*l.*, and the plaintiffs desired such question of compensation to be tried before a special jury, and gave due notice, on the 26th of March, 1858, of such desire to the defendants before the defendants had issued any warrant to the sheriff, &c.: that the defendants duly issued their warrant, under their common seal, to the sheriff of the county of Stafford, requiring him to nominate a special jury for such trial, and a special jury was duly nominated and reduced by the said sheriff: that the sheriff duly summoned the twenty special jurymen remaining after such reduction, to meet on &c., at &c., such time not being less than fourteen nor more than twenty-one days after the receipt of such warrant, and such place not being more than eight miles distant from the said mines and minerals; and forthwith gave notice to the defendants of the time and place so appointed by them: that, at the same time and place, the plaintiffs and defendants, by their agents, the twenty special jurymen and the sheriff being present, the twelve jurymen who first appeared on their names being called over, made oath that they would truly assess such compensation, &c.: that the question of such compensation was duly inquired into, &c., and the compensation assessed by the said jury to the plaintiffs was 100*l.*; and the sheriff gave judgment for the said sum, and the said verdict and judgment was signed by the sheriff, and being so signed

1859.

FLETCHER  
v.  
GREAT  
WESTERN  
RAILWAY Co.

1859.  
FLETCHER  
v.  
GREAT  
WESTERN  
RAILWAY CO.

was duly delivered to the clerk of the peace for the county : yet the defendants have not paid, &c.

The defendants pleaded. — That, before the plaintiffs became owners of the said mines and minerals, the defendants, in pursuance of the powers of the said Act, were seised in their demesne as of fee, of the lands under which the said mines and minerals were (save and except the said mines and minerals), under a deed of conveyance to them, executed by Sir Francis Scott and Lady Emily Foley, and had become so seised, and the land was so conveyed, for the purpose that the defendants should make a part of their railway upon the same, of which Sir F. Scott and Lady Emily Foley at the time of the conveyance had notice : that the plaintiffs, afterwards, and after the making of the railway upon the said land, became the owners of the said mines and minerals by virtue of a certain grant and conveyance thereof to them made by Sir F. Scott and Lady Emily Foley ; and that the plaintiffs, when they became such owners, had full notice that the said land, and the surface thereof, had been so purchased by and conveyed to the defendants for the purpose aforesaid ; and that part of the said railway had been so made upon the same : that before and at the time when the plaintiffs became such owners, the defendants had, by virtue of the said conveyance to them, and by reason of their having so made part of the said railway upon the said land and surface, become and then were entitled to reasonable adjacent and subjacent support for their railway, of which the plaintiffs then had notice ; and that the working of the said mines, of which the plaintiffs gave such notice as in the declaration mentioned, would, and must have taken away and destroyed the said adjacent and subjacent support ; and that such taking away and destruction of support were and are the damage likely to accrue to the said works, in the said notice mentioned ; and that the defendants gave


the notice in order to prevent, and because they had no other means of preventing, the plaintiffs from taking away and destroying such adjacent and subjacent support, by working the mines, and not otherwise, and because great injury and damage would have been done to the railway by the said taking away and destroying the adjacent and subjacent support; and that, upon the holding of the inquisition, the defendants appeared and protested that they were not liable to pay any compensation for the mines, and that they would not be bound by the finding of the jury as to the amount of such compensation; and that, upon the holding of the inquisition, the jurors gave a verdict that the getting of the mines would cause the subsidence of parts of the railway; and further, that if there were no railway upon the land, the getting of the said mines would cause the land and the surface thereof to subside.

The plaintiffs took issue upon the plea.

The facts relied on by the defendants as proving their plea are the following:—

Sir F. Scott and Lady Emily Foley being seised in fee, in equal moieties, of the land containing the minerals in respect of which compensation was claimed, by a written agreement, dated the 8th of June, 1852, contracted to sell part thereof to the defendants, and on the 24th of June, 1852, by deed, conveyed such part to the defendants. On the 30th of June, 1854, Sir F. Scott and Lady Emily Foley, by another written agreement, contracted to sell the residue of the said land to the defendants, and the same was conveyed by them to the defendants by a deed dated the 21st of December, 1854. The first mentioned deed was as follows:—“We, Sir Francis Scott, Baronet, the owner in fee of one undivided moiety of the hereditaments hereinafter conveyed, and the Right Honorable Emily Foley, commonly called Lady Emily Foley, the owner in

1859.  
FLETCHER  
v.  
GREAT  
WESTERN  
RAILWAY CO.

1859.  
  
**FLETCHER**  
 v.  
**GREAT**  
**WESTERN**  
**RAILWAY CO.**

fee of the other undivided moiety of the hereditaments hereinafter conveyed, In consideration of the sum of 7940*l.* paid to us in equal moieties, pursuant to "The Birmingham, Wolverhampton and Dudley Railway Act, 1846," by the Birmingham, Wolverhampton and Dudley Railway Company incorporated by the said Act, Do hereby convey to the said Company, their successors and assigns, All those pieces of ground situate at Bradley in the parish of Sidgley, and in the township of Bilston in the parish of Wolverhampton, in the county of Stafford, containing 7 a. 1 r., &c., and also all buildings and erections now standing and being on the said pieces of land or any part thereof, the particular shape, boundaries and position of which said pieces of ground are delineated in the plan hereupon indorsed, and which said pieces are numbered 37 and 38 in the map and book of reference of the said railway deposited &c.: together with all ways, rights and appurtenances thereto belonging, and all such estate, right, title or interest in and to the same, as we are, or shall become seised or possessed of, or are by the said Act empowered to convey: To hold the said premises to the said Company, their successors and assigns, for ever, according to the true intent and meaning of the said Act. In witness whereof we, the said Francis Scott and Lady Emily Foley, have hereunto set our hands and seals, this 24th day of June, 1852.

"Francis (L. s.) Scott.      Emily (L. s.) Foley."

The deed of the 21st day of December, 1854, was, with the exception of the mere description of the parcels and the date, in precisely the same terms.

The defendants purchased and acquired the land for the purpose only of making the railway by the Act authorized to be made, and Sir F. Scott and Lady Emily Foley knew that fact. And it is the fact, as alleged in the plea, that the plaintiffs, after the making the railway upon the

land, became the owners of the mines and minerals, by virtue of a conveyance by the said Sir F. Scott and Lady Emily Foley; and they, the plaintiffs, knew that the surface of the land had been purchased by, and conveyed to the defendants for the purpose aforesaid, and that part of the railway had been made upon it.

The working of the mines would have taken away and destroyed the adjacent and subjacent support of the railway, and such taking away and destruction of support were, and are the damage likely to accrue to the said works referred to in the plaintiffs' notice.

On the inquisition, the defendants appeared and made the protest mentioned in the plea; but they also went on and contested the amount of compensation.

The following is a copy of that part of the inquisition to which the last allegation in the defendants' plea relates, and the findings are, as alleged in the plea, true in point of fact.

The jury assess and give a verdict for the sum of 100*l.*, to be paid by the said Company to the said R. Fletcher and D. Rose by way of compensation in respect of the said mines of thick coal under and near to such parts of the said railway as were in the notice of the Company, dated the 19th of December, 1857, referred to. And the jurors further find and give a verdict that the getting of the said last mentioned mines would cause the subsidence of parts of the said railway; and further find and give a verdict that, if there were no railway upon the said lands, the getting of such mines would cause the said lands and the surface thereof to subside.

The questions for the opinion of the Court are: First, Whether the verdict is to be entered for the plaintiffs. Secondly, If not, whether the plaintiffs are entitled to judgment non obstante veredicto. If the first question is

1859.  
FLETCHER  
v.  
GREAT  
WESTERN  
RAILWAY Co.

1859.  
FLETCHER  
v.  
GREAT  
WESTERN  
RAILWAY CO.

answered in the affirmative, a verdict for 100*l.* and judgment thereon are to be entered for the plaintiffs &c.

*Gray* (with whom was *Kettle*) argued for the plaintiffs.—The question in the present case is whether a Railway Company, purchasing land under the provisions of the Lands Clauses Consolidation Act, 1845, acquires a right to the support of the subjacent and adjacent strata, so that, when the owner of the minerals desires to work them, he is not to be entitled to compensation if he cannot work them without letting down the surface. By the 77th section of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), it is enacted that the Company shall not be entitled to any mines of coal, &c., under any land purchased by them, except only such parts thereof as shall be necessary to be dug, or carried away, or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby. By section 78, if it appear to the Company, that the working of mines under the railway is likely to damage the works of the railway, the owner shall not work them; and if the Company and the owner do not agree as to the amount of compensation, the same is to be settled as in other cases of disputed compensation. At the time of the passing of this Act it was no new thing to empower companies to take lands for the purpose of their undertakings. The scheme has been that, on taking the land, the companies should pay only for the surface. If there are minerals under the land they are reserved to the owners, and various provisions have been made to meet the case of the owner desiring to get the minerals under the land taken. In Canal Acts there

are generally clauses enacting that the owner, when desirous of working minerals under or within a specified distance of the canal, shall give notice to the Company, who may inspect the mine to see what portion of the minerals may be gotten, and if the Company does not then make compensation the owner is allowed to work the minerals. It often happens that such companies allow the owner to get the minerals, and the land to fall in, and afterwards raise the banks of the canal, this being found cheaper than purchasing the minerals. In *The Wyrley and Essington Canal Company v. Bradley* (a) it was held that a Company so constituted could not maintain an action against a coal owner for an injury to their canal, the Company having neglected to purchase the minerals. *The Dudley Canal Navigation Company v. Grazebrook* (b) is a case upon a similar act of parliament. Bayley, J., there points out that the Company do not pay to the landowner more than the value of the surface; that the Company are relieved from the great expense of buying the minerals, along the whole line of the intended canal, in the first instance, before it is constructed, and are enabled to postpone the purchase of them, until the time when the owners really want to get them; and that, when that happens, the Company have an option either to buy, in which case the landowner cannot get the minerals, but is fully compensated for the loss of his right; or not to buy, in which case he receives no compensation at all, and his right to get the minerals ought to remain as complete as if no canal had been made. Accordingly, the Court held that the only reasonable mode of construing a proviso, *that in working such mines and minerals no injury be done to the said navigation*, was to construe it with some qualification; viz. either that the party working the mines is to do no unnecessary damage to the

1859.

—  
FLETCHER  
v.  
GREAT  
WESTERN  
RAILWAY Co.

(a) 7 East, 368.

(b) 1 B. &amp; Ad. 59.

1859.  
 FLETCHER  
 v.  
 GREAT  
 WESTERN  
 RAILWAY CO.

navigation, or no extraordinary damage by working them out of the usual mode. The case of *The Dudley Canal Navigation Company v. Grazebrook* (a) was never disputed down to the time when the Railways Clauses Consolidation Act passed, and the evident intention of the 77th, 78th and 79th sections is to establish a rule for railway companies in accordance with that decision.

*Whateley* (with whom was *Phipson*), for the plaintiffs.—The Company purchased the land in question, and took a conveyance of it with “all ways, rights and appurtenances thereunto belonging and appertaining.” It is admitted that the mines and minerals are not included under these words, but a right of support is included. Such right is one of the ordinary incidents of property: *Smart v. Morton* (b), *Humphries v. Brogden* (c), *Rowbotham v. Wilson* (d). After the sale, Sir Francis Scott and Lady Emily Foley could not have let down the land, and thereby derogated from their own grant. [*Pollock*, C. B.—The argument would be conclusive but for the 77th, 78th and 79th sections of the Act.] The Act was intended to apply to all mines whether under or adjoining the railway, but not to cases between vendor and purchaser. This was a purchase by agreement, and not under the compulsory powers of the Act. If an adjoining owner desires to work his mines he may require compensation, or be entitled to work them; but there is nothing to enable a person, who has voluntarily sold his land at a high price for the purpose of the railway, to deprive the land of that support which is necessary to enable the Company to use it for the purpose for which he has sold it. Here the jury have found that if the coal is gotten the land will sink. Notwithstanding any right to use


(a) 1 B. & Ad. 59.

(b) 5 E. & B. 30.

(c) 12 Q. B. 739.

(d) 8 E. & B. 123.

the coal, the owner cannot get it so as to affect the safety of the line. In *The Caledonian Railway Company, appellants, Sprot, respondent* (a), the House of Lords held that a conveyance of land to a railway company, for the purposes of the line, gives a right by implication to all reasonable adjacent and subjacent support connected with the subject matter of the conveyance; and that, therefore, although in the conveyance to the railway company the minerals were reserved, the grantor was not entitled to work them, even under his own land, in any manner calculated to endanger the railway. [*Watson*, B.—It does not appear that the railway company in that case had any power, as they have under this Act, to stop all mining if they chose.]

1859.  
  
 FLETCHER  
 v.  
 GREAT  
 WESTERN  
 RAILWAY Co.

POLLOCK, C. B.—The plaintiffs are entitled to recover the sum awarded to them. It was contended, on the part of the defendants, that the conveyances having been by agreement between the parties, the case differs from that of a purchase under the compulsory clauses of the Act, and that the clauses in question are not intended to interfere with the common law rights of the parties. Possibly the provisions may be unjust, or in contravention of the common law rights of the parties; but their meaning is clear, and the Legislature having pronounced, we are bound to decide accordingly. The 77th section provides that mines shall be deemed to be excepted out of the conveyance, unless they shall have been expressly named therein, and conveyed thereby. That is enacted of all land purchased by any company constituted under the Act. Now this land was purchased by the Company, in the form given by the Lands Clauses Consolidation Act. The consequence is, that the Company purchased land, expressly excepting the minerals, which continued to belong to the


(a) 2 Macqueen, 449.

1859.  
 FLETCHER  
 v.  
 GREAT  
 WESTERN  
 RAILWAY CO.

former owners of the soil. The 78th section provides that mines, under the railway, shall not be worked, if the Company are willing to purchase them. All persons owning mines are put on the same footing, whether they are merely owners of mines under the railway, or persons who have sold the surface reserving the minerals. If the Company are unwilling to purchase, the owner may work the mines. If the Company think that it is for their interest to exclude the owner from getting the coal, in order to avoid the risk of mischief to their works, they may stop him by buying the coal. If they are indifferent about it, or cannot afford to buy, the owner may proceed to get the coal in the usual way. The plaintiffs are therefore entitled to judgment.

MARTIN, B.—I am of the same opinion. The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), form a code of law under which these public undertakings are constituted. There is a provision in the Lands Clauses Consolidation Act for the taking of lands by agreement, and a form is given. Here, in pursuance of an agreement between Sir F. Scott and Lady Emily Foley, and the defendants, the conveyance of the 24th of June, 1852, was executed. It is clear that the land was purchased under the Act, and not under the ordinary contract between vendor and vendee. The conveyance would have been void at common law. There is no doubt that the defendants bought by agreement, in the same way in which railway companies purchase land. I see no reason to suppose that the provisions made by the sections in question, are not perfectly just. The defendants never bought, or paid for the mines but only what they were entitled to buy, reading the Acts together. The 77th section shews that the mines are not conveyed because they are not

expressly conveyed. They remained in Sir F. Scott and Lady Emily Foley, not by reservation, as in *The Caledonian Railway Company v. Sprot (a)*, but by the act of the Legislature. The 78th section provides that, the mines being excepted, the owner shall only have a conditional right to work them, and enables the Company to take steps to prevent any chance of injury to the railway. The 79th section makes provision, that in case of the Company being unwilling to purchase the minerals, the owner must get them in a proper and careful manner. Railway companies are, therefore, protected from being obliged to buy mines which they do not want; they are enabled to buy, to secure themselves from injury, and if they do not choose to buy, the owner is bound to use proper care in working. *The Caledonian Railway Company v. Sprot (a)* did not turn upon this act of parliament, but upon the construction of a conveyance regulating the rights of the parties as between themselves. The plaintiffs are entitled to have the verdict entered for them. The plea is bad; therefore every averment in it must be proved. It contains an allegation that the defendants were entitled to reasonable support for their railway. That allegation is not proved, the defendants being only entitled to a conditional support.

1859.  
  
 FLETCHER  
 v.  
 GREAT  
 WESTERN  
 RAILWAY Co.

WATSON, B.—I concur with the rest of the Court. The conveyance in the present case is entirely a statutory proceeding. The plaintiffs are entitled to the mines reserved under the Act, and cases relating to common law rights have no application. The 77th section was enacted for the advantage of both parties. Railway companies are not to be incumbered with mines which are useless to them. The mines under the land of the Company are reserved to the owners of the land at the time of the conveyance. If

(a) 2 Macqueen, 449.

1859.  
 ~~~~~  
 FLETCHER  
 v.  
 GREAT  
 WESTERN  
 RAILWAY Co.

the owners desire to work them, or get the minerals within a certain distance of the railway, they must give thirty days notice, which is required because, in consequence of old workings, the railway might be endangered by workings at a distance. The Company may express its willingness to purchase, and thereby stop all working. The plea is not proved, and the plaintiffs are entitled to have the verdict entered for them.

Verdict to be entered for the plaintiffs (a).

(a) Compare *Roberts v. Haines*, 6 E. & B. 643; S. C. in error, 7 E. & B. 625.



Feb. 9.

THOMPSON, Appellant, HARVEY, Respondent.

The 2nd section of the 3 & 4 Vict. c. 61, which enacts "that every applicant for a license to retail beer shall produce to the officer of excise a certificate from an overseer, that he is the real resident holder and occupier of the house in which he shall apply to be licensed," is directory only, and therefore a licence may be valid, notwithstanding the certificate omits to state that the applicant is such householder.

THE following case was stated for the opinion of this Court under the 20 & 21 Vict. c. 43:—

On the 11th of October, 1858, H. Harvey, one of the constables of the parish of St. Giles in the borough of Colchester, laid an information before a justice of the peace for the county of Essex, which alleged that "A. Thompson, of the parish of Kirby in the said county, beer house keeper, within the space of three calendar months last past, to wit on &c., did unlawfully sell one pint of beer to one J. Woodman, to be consumed in the house of the said A. Thompson, situate at Kirby aforesaid, whercin such pint of beer was sold, without being duly licensed so to do, contrary to the form of the statute," &c.

Under this information a summons was issued, by which the defendant was required to attend at a petty session. On the hearing of the summons, both parties attended by

But a licence granted to a person who is not in fact such householder is void, the 1st section of the Act being imperative.

their respective attornies. The informant's attorney stated that the information was laid under the 3 & 4 Vict. c. 61, intituled "An Act to amend the Acts relating to the general sale of beer and cider by retail in England," the 1st, 2nd, 5th, 13th, 16th, 18th and 20th sections whereof are as follows:—(The case then set out the sections.) The license in this case was the first license the defendant Thompson had taken out for the sale of beer to be drunk on the said premises. In support of the information, the certificate under which the license to the defendant was granted was called for and received in evidence. The following is a copy of such certificate:—(The case then set out the application for the certificate, in which Thompson stated that he was "dwelling in a house in Lower Kirby, in the parish of Lower Kirby, in the county of Essex, being the real resident, holder, and occupier of the said house," &c.)


1859.  
 THOMPSON  
 v.  
 HARVEY.

#### Certificate.

"We, the undersigned, being inhabitants of the parish of Lower Kirby, in the county of Essex, and respectively rated to the poor at no less than six pounds per annum, and none of us being maltsters, common brewers or persons licensed to sell spirituous liquors, or being licensed to sell beer or cider by retail, do hereby certify that Arthur Thompson, dwelling in Lower Kirby in the said parish and county, is a person of good character. Dated" &c. (Then followed the names and residences of the persons who signed.)

"I do hereby certify that the [above named applicant is the real resident, holder, and occupier of the said house] (a), and that the true rent and annual value at which the house above mentioned, with the premises occupied therewith, are rated in one rating to the poor rate, according to the

(a) The words within brackets were struck out with red ink.

1859.  
  
 THOMPSON  
 v.  
 HARVEY.

last sum or rate made and allowed in the above parish of Kirby le Soken for the relief of the poor, is the sum of 8*l*. 14*s*.; and I further certify that all the above mentioned persons, whose names are subscribed to the said certificate, are inhabitants of the said parish of Kirby le Soken, rated in six pounds to the relief of the poor of the said parish.

(Signed) “W. G. C. Warner, Overseer of the parish of Kirby.

“Note.—Mr. Warner, the overseer, refused to sign the above without having the words as crossed in red ink (*a*) first struck out, and he accordingly struck them out before signing.

“Granted per Board’s order,

“E. J. H.

“The Supervisor’s memorandum.”

This certificate, as put in, was admitted as the certificate under which the said license was granted. The following is a copy of the license :—

“Retail beer and cider license, 3*l*. 3*s*., and additional 5 per cent. by 3 Vict. c. 61; to be consumed on the premises. 1 Wm. 4, c. 64; 4 & 5 Wm. 4, c. 85; 3 & 4 Vict. c. 61, and 11 & 12 Vict. c. 49. We, the undersigned, being the collector and supervisor of excise for the collection of Essex and district of Manningtree, do hereby authorize and empower Arthur Thompson, now being a householder and dwelling in a house in Lower Kirby, in the parish of Lower Kirby, within the limits of the said collection and district, to sell beer, ale and porter, cider and perry, by retail in order that it may be consumed in the said dwelling-house of the said Arthur Thompson and in the premises thereunto belonging; the said Arthur Thompson having entered into a bond, with William Bloom, of Lower Kirby, as his surety, and having deposited a certificate

(*a*) The words within brackets, p. 255, were struck out with red ink.

signed by six persons, videlicet (then followed the names of the persons), all of Lower Kirby, and by William George Warner, the overseer of the said parish, according to the statute in such case made and provided &c. (Then followed the usual conditions.)

(Signed) "John Clare, Collector.

"J. Harris, Supervisor."

It was proved to the satisfaction of the justices that the defendant sold beer to be drunk on the premises on the day alleged in the information. It was also proved to their satisfaction that the certificate produced before them was the certificate produced by the defendant to the officer of excise, and that it was the certificate under which the license was granted to the defendant.

The license was also produced on the part of the defendant, and evidence was given that the supervisor of the district had, upon the certificate being produced to him, discovered its informality in respect of the erasure of the words "above named applicant is the real resident holder and occupier of the said house," having been erased by Mr. Warner, the overseer, before he signed, and that, in consequence of such informality, the supervisor had communicated with the Board of Inland Revenue upon the subject, who directed him to inquire into the facts of the case and report accordingly; and that, having inquired and satisfied himself that the applicant was the real resident occupier of the said house and premises and signified the same to the Board, he received orders to grant the license, and it was therefore granted pursuant to the Board's directions.

It was argued by the solicitor of the defendant that the license was legal, and in support of such argument he referred to the 1st, 2nd and 4th sections of the 1 Wm. 4, c. 64; 4 & 5 Wm. 4, c. 85, ss. 1, 2 and 3; and the 3 & 4 Vict. c. 61, ss. 1, 2 and 5; and contended that the certifi-

1859.  
THOMPSON  
v.  
HARVEY.

1859.  
THOMPSON  
v.  
HARVEY.

cate and license were conformable to the two first mentioned Acts; and that the 2nd section of the 3 & 4 Vict. c. 61 was merely directory; and that the absence of the words "such applicant is the real resident holder and occupier of the said house," in a certificate tendered for a license, would not invalidate a license if the Board of Inland Revenue were satisfied to grant a license under such a certificate. On the contrary, it was contended by the attorney in support of the information, that any license granted upon a certificate, which omitted the statement that the applicant was the real resident, holder, and occupier of the premises for which the license was sought to be obtained, was a void license, and that the Board of Inland Revenue could not dispense with what (he contended) was an essential requisite in the certificate to be produced to the officer of excise.

The attorney for the defendant tendered the defendant himself and William Bloom, his bondsman, for examination, but the magistrates declined taking the evidence of either of them, considering that the certificate under which the license was granted was not conformable to the Act for the want of the words "the above named applicant is the real resident holder and occupier of the said house;" and they adjudged the said license void, and convicted the defendant in the mitigated penalty of 5s.

*Grant (Edward James with him), for the respondent.*—The license is void. The legislature has required, as a condition precedent to the grant of a license, that the applicant shall produce a certificate that he is the real resident, holder, and occupier of the house in which he shall apply to be licensed. The 3 & 4 Vict. c. 61, s. 1, after reciting the 11 Geo. 4 & 1 Wm. 4, c. 64, and 4 & 5 Wm. 4, c. 85, enacts: "That no license to sell beer or cider by retail under the said recited Acts or this Act shall

be granted to any person who shall not be the real resident, holder, and occupier of the dwelling-house in which he shall apply to be licensed, nor shall any such license be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the parish," &c., on a specified rent, varying according to the population. The section also declares that every license granted contrary thereto shall be null and void. By section 2, "every person who shall apply to be licensed to retail beer or cider shall produce to the proper officer of excise authorized to grant such licenses a certificate in writing from an overseer of the township, parish or place in which he shall reside, certifying that such applicant is the real resident, holder and occupier of the said house, and also certifying the true rent or annual value at which such house, with the premises occupied therewith, is rated in one rating to the poor rate, &c., and every such certificate shall be deposited and left with the proper officer of excise by whom such license shall be granted," &c. Those enactments are not directory only, but obligatory. [*Martin*, B. — Suppose an overseer refuses to certify.] He may be compelled by mandamus. [*Welsby* referred to *Regina v. Kensington* (a).] *Regina v. Langridge* (b) is an authority that a mandamus may issue directing the overseer to inquire whether the applicant is a householder. This case falls within the rule that, when a new authority is vested in any body, the condition upon which it is granted must be strictly pursued: *Rex v. Lordale* (c), *Bain v. The Whitehaven Railway Company* (d). The 20th section of the 3 & 4 Vict. c. 61 declares that all the provisions of the two recited Acts shall be deemed and taken to be in full force, except where they are altered by the Act; and by

1859.

THOMPSON  
v.  
HARVEY.

(a) 12 Q. B. 654.

(b) 24 L. J., Q. B. 73.

(c) 1 Burr. 445.

(d) 3 H. L. 1.

1859.  
 THOMPSON  
 P.  
 HARVEY.

the 9th section of the 4 & 5 Wm. 4, c. 85, "no licen the sale of beer &c. shall be granted, except upo certificate thereby required." Therefore the excise has no power to grant a license without the product a certificate. The overseers are presumed to be acqu with the householders of the parish; and in extra-par places the certificate must be signed by two inha householders. [*Martin, B.*—The 1st section of the Vict. c. 61 is imperative; but the 2nd section is dir only. If the overseer refuses to certify, the excise may grant the license, provided he is satisfied the applicant is in fact the real resident, holder, and oc of the house. If your construction is right, the ove would be in the position of licensing magistrates. Th section only imposes a penalty on overseers who ref grant a certificate of the *rating*. *Watson, B.*—By th section, in the case of any person becoming the oc of a house newly erected, the excise officer may gi license upon a certificate of the rating only, provide applicant is in other respects duly qualified.] By sect a penalty of 50*l.* is imposed on any person who shall ingly use a false certificate. In *Regina v. The Over Salford* (a) *Coleridge, J.*, intimated an opinion that a li granted without a certificate from an overseer mig void.—He referred to *Rex v. Downs* (b), *Lovell v. Cur Regina v. Frost* (d).

*Welsby*, for the appellant.—The provision in the section of the 3 & 4 Vict. c. 61, that the party app for a licence shall produce a certificate from an ove that he is the real resident, holder, and occupier o house, is not a condition precedent to the validity o

(a) 18 Q. B. 687.

(b) 3 T. R. 561.

(c) 7 T. R. 631.

(d) 9 C. & P. 129.

licence, but is merely directory and for the purpose of satisfying the excise officer as to the fact. The 11 Geo. 4 & 1 Wm. 4, c. 64, contains no provision of that kind; but the 4 & 5 Wm. 4, c. 85, s. 2, requires that every person applying for a licence to sell beer by retail shall deposit with the person authorized to grant the licence a certificate of good character signed by six rated inhabitants of the parish; and at the foot of such certificate one of the overseers shall certify (if the fact be so) that such six persons were rated inhabitants. The 3rd section imposes a penalty on any overseer who shall refuse or neglect to grant such certificate. Then comes the 3 & 4 Vict. c. 61, in which the contrast between the 1st and 2nd sections is remarkable. The 1st section contains prohibitory words—not that every applicant for a licence shall have a certificate that he is the real resident, holder, and occupier of the house, but that *no licence shall be granted* to any person who is not such householder. The section then proceeds—nor shall any such licence be granted in respect of any dwelling-house which is not rated at a certain amount; and the section concludes by saying that every licence granted contrary thereto shall be null and void. [*Watson, B.*—The condition precedent to the grant of the licence is the being the real resident, holder, and occupier of the house; the certificate is only required as evidence of the fact.] If a licence was granted to a person who was rated at a less amount than required by the statute, it would be void, notwithstanding he obtained a certificate that he was a householder.

MARTIN, B.—I am of opinion that the conviction is wrong, and that the judgment ought to be reversed. These houses for the sale of beer by retail, exclusive of spirits, were first established by the 11 Geo. 4 & 1 Wm. c. 64. That Act was amended by the 4 & 5 Wm. 4, c. 85, which

1859.  
 THOMPSON  
 v.  
 HARVEY.

1859.  
THOMPSON  
v.  
HARVEY.

contains a distinct enactment that the "licence shall not authorize the person obtaining it to sell beer or cider to be drunk or consumed in the house or on the premises specified in the same licence, unless the same be granted upon the certificate thereafter required:" sect. 1. That certificate is a certificate of good character, signed by six rated inhabitants of the parish and certified by one of the overseers: sect. 2. Then, by the 9th section, "no licence for the sale of beer or cider by retail to be consumed or drunk in the house or on the premises shall be granted, except upon the certificate hereby required." Therefore the legislature enacted that the commissioners of excise should not grant a licence unless a certain thing was done; and if they granted it in defiance of that provision, it would be void. But when we look at the 3 & 4 Vict. c. 61, its language is essentially different. It is a rule of construction that matters shall not be deemed to be conditions precedent unless they are declared to be so. That is a sound rule to apply to statutes, and unless the legislature has in plain words said that a certain thing shall be a condition precedent, we must not so construe it. I am of opinion that a certificate from an overseer that the applicant is the real resident, holder, and occupier of the house was never intended to be a condition precedent to the granting of the licence. No doubt the commissioners of excise, before granting the licence, ought to see that the provisions of the 2nd section are complied with; and they ought not to grant the licence without a certificate, unless there is sufficient reason for dispensing with it; but, if they do, the licence is not null and void. It was contended, that if the overseer should refuse to grant a certificate, although no penalty is imposed on him, there is a remedy by mandamus. But the consequence would be that the overseer might deprive the applicant of his licence, and prevent the public from having the benefit of these

beer houses; merely because the overseer in his caprice, or from some motive of his own, such as a disapproval of beer houses, should think fit to withhold the certificate. Thus, the licensing of beer houses would be entirely in the hands of overseers, and they would possess a power which has frequently been the subject of complaint as exercised by justices; and with this aggravation, that the act of the overseers would be done in secret, whilst the justices must act in public, which affords some check upon them. The 2nd section enacts, that every person who shall apply to be licenced to retail beer shall produce a certificate in writing from an overseer of the place in which he shall reside, "certifying that such applicant is the real resident, holder, and occupier of the said house," &c.; but it does not proceed to say that, if such certificate is not produced, the licence shall not be granted. There is, however, in the 1st section an enactment in direct terms, that no licence to sell beer by retail "shall be granted to any person who shall not be the real resident, holder, and occupier of the dwelling-house in which he shall apply to be licenced;" and the section, after a number of other provisions, goes on to enact that "every licence granted contrary thereto shall be null and void." Therefore, if the applicant is not the real resident, holder, and occupier of the dwelling-house, his licence is null and void; but there is nothing of that kind in the 2nd section. The 5th section imposes a penalty on every overseer who shall refuse to grant a certificate of the rating of any house; but no penalty is imposed for refusing to grant a certificate that the applicant is the real resident, holder, and occupier of the house. For these reasons I am of opinion that the licence is valid.

WATSON, B.—I am of the same opinion. No doubt, in a new statute, we may construe affirmative words as impera-

1859.  
THOMPSON  
v.  
HARVEY.

1859.  
THOMPSON  
v.  
HARVEY.

tive, and not directory only; the 3 & 4 Vict. c. 61, however, is not a new statute but an Act to amend the former Acts relating to the licencing of beer houses. It is remarkable that when the legislature intended to prevent a licence being granted, or meant that, if granted, it should be void, they have distinctly said so. The 2nd section requires that every applicant for a licence shall produce to the officer of excise a certificate from an overseer that he is the real resident, holder, and occupier of the house in which he shall apply to be licenced, but that section does not say that the officer shall thereupon grant a licence; and I am satisfied that the only object of requiring a certificate was to afford the officer the means of obtaining the necessary information, and that his jurisdiction to grant the licence does not depend on the production of the certificate. Suppose, notwithstanding the certificate, he knew that the applicant was not a householder, would he not be justified in refusing the licence? But when we look at the 1st section, it is clearly imperative—"no licence shall be granted to any person who shall not be the real resident, holder, and occupier of the dwelling-house." It does not say that no licence shall be granted to any person unless he has obtained a certificate, or that a person shall be deemed a householder if he has obtained a certificate. The 1st section also says that every licence granted contrary thereto shall be null and void; and when we find such strong terms in that section, how can we import them into the second? If a person who was not a householder obtained a licence, it would be void; but I am clearly of opinion that the provisions of the 2nd section are directory only.

Judgment for the appellant (a).

(a) *Bramwell*, B., had left the Court.

1859.

## GRIFFIN v. COLEMAN.

Feb. 12.

**T**HIS was an appeal from the County Court of Kent holden at Hythe. The action was for assaulting and handcuffing the plaintiff and conveying him to Hythe handcuffed. The case was tried before a jury, and the following evidence was given on the part of the plaintiff.

On the 15th of July, 1858, at 4 o'clock in the morning, the plaintiff and one Jeffery were bathing in the sea at Sandgate, the plaintiff being in the water. Simmons, a policeman, threatened to take the plaintiff into custody for indecently bathing. Jeffery expostulated; upon which Simmons assaulted him, and blows were exchanged between them. Simmons, the plaintiff, and Jeffery ultimately went together to the lock-up at Sandgate. A constable named West was at the station. Simmons told West he charged Jeffery with assaulting him, and the plaintiff with indecently bathing. The plaintiff told West he had come there to prefer a charge against Simmons for assaulting his friend, and that he wished to see the superintendent. The plaintiff and Jeffery were pushed into a cell and locked up. This was about 5 o'clock. After a time the plaintiff knocked at the door, and saw a police sergeant, to whom he complained that he ought not to be detained on a charge of indecently bathing; whereupon he was told that that charge was abandoned, and that he should be charged with the same offence as Jeffery.

A police constable having imprisoned the plaintiff in a cell, on a charge of aiding another person in assaulting him in the execution of his duty, some hours afterwards the defendant, the chief constable, arrived at the station, and on the report of another constable, without inquiring into the facts, handcuffed the plaintiff and took him before the magistrates, who dismissed the charge:—*Held*, that the defendant, in order to justify himself, was bound to shew that the charge was well founded, and that having failed to do so, he and all other persons concerned in the imprisonment of the plaintiff were liable in trespass.

A party desirous of appealing from a decision of a County Court judge, having given notice of appeal, under the 13 & 14 Vict. c. 61, s. 14, within ten days deposited with the registrar a sum equal to the amount for which he was required to give security, for which the registrar gave an acknowledgment, but did not deposit a written memorandum, setting forth the conditions on which the money was deposited, pursuant to the 19 & 20 Vict. c. 108, s. 71.—*Held*, that the want of such memorandum was no objection to the hearing of the appeal.


1859.  
GRIFFIN  
v.  
COLEMAN.

The defendant, who was the superintendent, came about half past ten. The plaintiff told him he had come to prefer a charge against Simmons, and that he himself had been charged with indecently bathing. The defendant told the plaintiff he was charged with aiding and abetting Jeffery in assaulting Simmons. The plaintiff requested that he might be bailed, and told the defendant that he occupied a farm in the neighbourhood. The defendant knew the plaintiff. The defendant insisted on handcuffing the plaintiff, threatening him with violence if he resisted, and took him before the magistrates at the Town Hall at Hythe. The magistrates eventually dismissed the case.

In his defence, the defendant swore that, early in the morning of the day in question, he was informed by a constable named West that the plaintiff and Jeffery were in custody for assaulting a policeman. That he went to the station, where he found the constable, and was told by Mayne and West that they were in custody for assaulting Simmons. Simmons was in bed, suffering from a swelling of the face and throat, unable to speak plainly. West and Mayne said that the plaintiff and Jeffery had endeavoured to force the door. He admitted that he did not make any inquiry into the circumstances of the case. Simmons was not called as a witness.

The learned County Court judge directed the jury that the action was in substance for false imprisonment, of which the handcuffing was an aggravation, and that the alleged defence was that the defendant was justified in what he did: that Simmons had no right to interrupt the plaintiff and Jeffery while bathing: that there was no evidence that Simmons was assaulted in the execution of his duty: that, if the jury believed the plaintiff, Simmons and West were not justified in locking up the plaintiff. After the plaintiff had been so locked up for some hours, the defend-

ant, who had the management of the station, and under whom the constables act, arrived at the station, and the imprisonment was continued; the plaintiff was handcuffed and taken to Hythe: that, as these officers took upon themselves to act as prosecutors, they ought to shew that their proceedings were well founded: that defendant admitted that he made no inquiry as to the circumstances, but acted on what was told him: that, if the plaintiff's account was true, the detention and continuance of the imprisonment were illegal. In considering the amount of damages, he desired the jury to consider the harshness with which the plaintiff had been treated. The jury found a verdict for the plaintiff, with 10*l.* damages.

1859.  
  
 GRIFFIN  
 v.  
 COLEMAN.

*Prentice*, for the respondent, took a preliminary objection to the hearing of the appeal, founded upon an affidavit by the plaintiff's attorney that he had searched the office of the registrar of the County Court, and was informed by the deputy registrar that the defendant's attorney, on the 13th of September, gave due notice of his intention to appeal, and deposited the sum of 20*l.*, being the sum fixed as security for the costs of the appeal, but did not deposit any memorandum in writing setting forth the conditions on which the sum of 20*l.* was deposited; and that the defendant had not delivered any memorandum in writing to the registrar; and that notice that the objection would be relied upon when the case came on for hearing had been given to the appellant's attorney.

By the 13 & 14 Vict. c. 61, s. 14, the giving of security for costs within ten days is made a condition precedent to the right to appeal: *Stone v. Dean* (a). By 19 & 20 Vict. c. 108, s. 71, "where by any of the Acts relating to the County Courts a party is required to give security, he may,

(a) 27 L. J., Q. B. 319.

1859.  
GRIFFIN  
v.  
COLEMAN.

in lieu thereof, deposit with the registrar, &c. a sum equal in amount to the sum for which he would be required to give security, together with a memorandum to be approved of by such registrar, &c., to be signed by such party, his attorney or agent, setting forth the conditions on which such money is deposited, and the registrar, &c. shall give to the party paying a written acknowledgment of such payment." In the present case no memorandum was deposited, and the appellant has therefore not brought himself within the provisions of the Act.

POLLOCK, C. B.—The proper course would have been to move to strike out or quash the appeal. However, the money having been paid within ten days, and the registrar knowing the purpose for which it was paid, and having given an acknowledgment that he had received it for such purpose, it is sufficient.

*Barrow*, for the appellant.—The defendant, who was the chief constable, found the plaintiff in custody at the police station, and did no more than was necessary to enable him to take the plaintiff before the magistrates at Hythe that the charge might be inquired into before them. The County Court judge was therefore in error in treating the action as in substance an action for false imprisonment, and supposing that the defendant was bound, in order to justify himself, to shew that the imprisonment was lawful. [Pollock, C. B.—Do you contend that a constable is justified in taking any person who may have been apprehended before a magistrate?] If the charge made by Simmons was true, the offence was one which would have justified him in apprehending the plaintiff: 2 Hale P. C. 88. The defendant had no jurisdiction to inquire into the truth of the charge. [Martin, B.—Here the imprisonment was

wholly illegal, and all the parties concerned in it were trespassers.] In 1 Hale P. C. 592, it is said: "Although the constable be well assured, after the arrest by him made, that A. was not the person who did it, yet he may not by the law discharge him, but must bring him before a justice, who may, upon due circumstances, discharge, bail or commit him as he sees cause; but the constable if he discharges him is fineable." [*Martin*, B.—That relates to an arrest on a charge of felony, where a constable may arrest on reasonable suspicion.] It is enough that there was reasonable ground on which the defendant acted: *Davis v. Russell* (a), *Beckwith v. Philby* (b). [*Martin*, B.—Those are cases of felony. *Pollock*, C. B.—The defendant admits that he made no inquiries. I think that he was bound to do so; he should have taken the chance of ascertaining the truth.]

1859.  
 GRIFFIN  
 v.  
 COLEMAN.

*Prentice* was not called on.

*POLLOCK*, C. B.—The imprisonment was utterly illegal. The defendant was a party to it. If he had not acted as he did—if he had acted courteously, it is probable that no action would have been brought against him, or the damages might not have exceeded a farthing. However, he chose to act without making any inquiries, and conducted himself with great harshness, which always ought to be reprobated. The summing up appears to be a good one, and the appeal must therefore be dismissed.

*MARTIN*, B.—I am of the same opinion. The question of law is clear. *Simmons*, a constable, had taken the plaintiff into custody unlawfully. The other constables, knowing nothing of the facts, imprisoned and detained him. Every

(a) 5 Bing. 354.

(b) 6 B. & C. 635.

1859.  
 ———  
 GRIFFIN  
 v.  
 COLEMAN.

person who takes part in an unlawful imprisonment acts at his peril. Suppose a constable is told that a misdemeanor has been committed: he has no power to arrest. The power to apprehend on suspicion is confined to cases of felony.

WATSON, B.—Mr. *Barrow* tried to liken this case to one where a man is arrested on suspicion of felony. But for breaches of the peace a constable can only arrest upon the view. In a plea to an action of trespass the defendant would have been bound to justify the imprisonment (a).

Appeal dismissed.

(a) See 3 Chitty on Pleading, by Greening, p. 328, n.

Feb. 12. FREDERICK HENRY COLLINS, by HENRY COLLINS his next Friend, v. BROOK.

An attorney who, as attorney for the plaintiff in an action by an infant suing by prochein amy, has received the damages and costs recovered from the defendant in such action, is liable to the infant in an action for money had and received.

**ACTION** for money had and received to the use of the infant plaintiff.

Pleas.—First: Never indebted. Secondly: Set-off for work and labour done by the defendant for the plaintiff.

Replication to the first plea: Issue thereon.—To the second plea; first, nil debet.—Secondly, infancy of the plaintiff.

Rejoinder, taking issue on the replication.

At the trial, before *Bramwell*, B., at the sittings in London after Michaelmas Term, it appeared that the plaintiff, a child seven years old, having been bitten by a dog belonging to one Lefever, Henry Collins, his father, consulted the defendant, an attorney, as to bringing an action for the injury. The defendant told him that if successful the child would get from 30*l.* to 40*l.* The father then asked what

would be the expense if he lost. The defendant said "50*l.*, or say 80*l.* to be safe; if you succeed you will have nothing to pay." He also said that the child would get the damages. On a subsequent occasion he made a statement to Mrs. Collins, the wife, in the presence of her husband, that Lefever would have to pay the costs if the plaintiff won. The writ in that action was sued out by the infant in person, after which, upon the petition of the infant, Henry Collins, the father, was appointed to prosecute the action for the plaintiff as his next friend during his minority in the usual way (*a*). The cause was tried and a verdict found for the plaintiff with 30*l.* damages; and the now defendant, as the attorney in that cause, received from the defendant for damages and costs 185*l.* 7*s.* 6*d.*, for which he gave a receipt, signing himself "plaintiff's attorney." In the present action the plaintiff claimed the 30*l.* and 1*l.* 10*s.* expenses allowed to the plaintiff in the former action and received by the defendant. The defendant's counsel objected that the action should have been brought by Henry Collins and not by the infant; and he called the defendant who swore that he had made no special bargain at all as to the costs in the action of *Collins v. Lefever*; and that the father had supplied him with 20*l.* to pay counsel's fees. The defendant further proved, that in consequence of the cause having been made a remanet the plaintiff's costs were unavoidably larger than had been anticipated, and that the Master on taxation of the costs, as between party and party, had disallowed 49*l.* as not chargeable against the defendant Lefever; but that on a subsequent taxation of costs, as between himself and the prochein amy, the costs were taxed at 194*l.* 12*s.* 8*d.*, which sum, together with 11*l.* 7*s.* 6*d.*, the costs of taxation, he sought to set off against the plaintiff's demand in this action.

1859.

COLLINS  
v.  
BROOK.

(*a*) See Chitty's Forms, 696.

1859.  
 COLLINS  
 v.  
 BROOK.

Upon these facts the learned Judge told the jury, that it was for the plaintiff to shew a bargain to deprive the defendant of his right to extra costs. He asked them whether they thought that the defendant's statement, that if the plaintiff got a verdict the expenses would fall on the other side and the child would get the damages, was a bargain and positive promise intended to be binding let what might happen; or whether it was merely a representation of what the law is, and of his impression that no claim to extra costs would arise. He pointed out that the defendant had sworn that no special bargain was made, and said it was probable that the defendant did not intend to convey that impression; but that if he used words which naturally induced Collins to suppose that he would not be liable, it was enough. He also asked for whom did the defendant receive the money. The jury found that the defendant did convey to Collins the idea that he was not to be liable for extra costs, and that he received the money for the use of the infant. The verdict was entered for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him.

*Atherton*, in Hilary Term, obtained a rule nisi to enter a verdict for the defendant on the grounds; first, that the action did not lie at the suit of the infant plaintiff, there being no privity of contract between him and defendant. Secondly, that there was no evidence to go to the jury that the defendant received the sum of 31*l.* 10*s.* to the use of the plaintiff. Thirdly, that there was no evidence to go to the jury that the defendant agreed to forego all claim to extra costs; and, therefore, that the defendant's lien for such costs was an answer to the action.

*Huddleston* and *Barnard* shewed cause (*a*).—The question

(*a*) Feb. 8. Before *Martin*, B., *Bramwell*, B., and *Watson*, B.

is, whether an infant plaintiff can sue the attorney in the cause for money received by him from the defendant in respect of damages awarded to the infant. There are no authorities on the subject, and the case must therefore be decided upon general principles. The infant was the person injured, and the money when recovered belonged to him. If the prochein amy were the proper person to sue, the attorney might set off the debt of the prochein amy against the money due to the infant. But it may be urged that an action for money had and received will not lie unless there is privity. There is a privity between an infant plaintiff and the attorney in the cause. The case does not resemble that of the London agent of the attorney in a cause receiving money for the plaintiff. In that case the London agent is an entire stranger to the plaintiff: *Robbins v. Fennell* (a). [*Martin*, B., referred to *Cobb v. Beche* (b).] But in the case of an infant the writ is issued by the plaintiff,—the indorsement is in the ordinary form. There is at that time no prochein amy. The prochein amy is appointed, not to initiate but to prosecute the action. He is the officer of the Court for the purpose of legally appointing an attorney for the infant. In an affidavit by the attorney in the cause, he describes himself as attorney for the plaintiff. In *Chandler v. Vilett* (c), there is a record, in an action by an infant suing by guardian, from which it appears that both damages and costs were awarded to the infant. It may be urged that it would be hard that the prochein amy should be liable to the costs, if he could not sue the attorney for the sum recovered. But both the attorney and the prochein amy are the officers of the Court. In *Morgan v. Thorne* (d), it was held that a prochein amy might receive the damages, and give a valid discharge to the defendant

1859.  
 COLLINS  
 v.  
 BROOK.

(a) 11 Q. B. 248.

(c) 2 Saund. 117.

(b) 6 Q. B. 930.

(d) 7 M. &amp; W. 400.

1859.

COLLINS  
v.  
BROOK.

for the payment of the sum recovered. But it amounts to no more than that, the *prochein amy* being an officer appointed by the Court to receive money for the infant, payment to him is good. In the present case, when the money was received from Lefever, the defendant gave a receipt describing himself as "plaintiff's attorney:" that is evidence to shew that the money was received to the use of the plaintiff. [*Watson, B.*—On the other hand H. Collins, the father, employed the defendant and supplied him with the money to carry on the suit. The words "plaintiff's attorney" are only what were necessary to describe the nature of the transaction.] It was evidence with which the jury might deal, though perhaps very slight. As to the last point, the plaintiff held out to the *prochein amy* that no charge for extra costs would be incurred. Therefore, it cannot be said that there was no evidence for the jury.

*Atherton and T. Jones*, in support of the rule.—An action does not lie against the attorney at the suit of the infant plaintiff, because there is no privity of contract between the attorney and the infant. The action for money had and received must be founded on a contract to pay money over to another, or on a tortious receipt, where the party may waive the tort. [*Martin, B.*—If a person receives money for another, and that other ratifies the act, he can sue for money had and received.] In the present case the damages and costs were received under a distinct and specific contract, which negatives the presumption of any other. There was one receipt and one privity. The judgment entitled the *prochein amy* to the damages and costs. The moment they were paid over by the defendant Lefever they were received to the use of the party entitled to them, viz. the *prochein amy*, as the immediate client of the present defendant. The test is: who would have been

liable for costs to the attorney? Archbold's Practice, by Chitty, p. 1169 (a), and *Marnell v. Pickmore* (b), are authorities that the prochein amy is primarily liable to the attorney. All the facts shew that the contract was with the father. He conferred with the defendant, gave instructions for the action, found the money, and requested that the bill should be sent in to him. It cannot be said that both the plaintiff and the prochein amy could sue. If the prochein amy could have been sued, it would seem that he must be the right person to sue. An infant cannot appoint an attorney. The defendant's liability proceeds wholly on his appointment as attorney. *Morgan v. Thorne* (c) shews how completely the prochein amy is independent of the infant. It was there held that no authority from the infant is necessary to enable the prochein amy to sue. Yet the infant may be taken in execution for the costs: 2 Archbold's Practice, by Chitty, p. 1169, *Gardiner v. Holt* (d). Suppose a prochein amy sued for rent due to the infant and got a verdict for 500*l.*, and the attorney refused to pay it over because he had a set-off; as the attorney knew in what character the retainer was given, on the application of the infant or the prochein amy the Court might interfere to control its own officer. Again, under the Statute of Set-off, debts to be set off against each other must be due in the same right. Taking the view which this Court did of the position of the prochein amy, that he is as it were an attorney appointed by the Court, he is not bound to appoint an attorney in the action; but, if he does, the privity is between such attorney and the prochein amy. The relation of the London agent to the country attorney is precisely analogous to that of the prochein amy and the attorney in the cause. If this action is maintainable, the defendant would have had a right to pay the infant; but the policy of the law is that, when an infant is suitor,

1859.

COLLINS  
v.  
BROOK.

(a) 9th edition.

(b) 2 Esp. 473.

(c) 7 M. &amp; W. 400.

(d) 2 Stra. 1217.

1859.  
 COLLINS  
 v.  
 BROOK.

the funds shall not come to his hands till he is of age. Until that period the prochein amy is a trustee for him. They referred also to *Eyre v. The Countess of Shaftsbury* (a) and *Sinclair v. Sinclair* (b).

*Cur. adv. vult.*

BRAMWELL, B., now said (Feb. 12):—The first question was, whether there was evidence for the jury that the defendant had agreed to make no claim for extra costs if the action was successful. We think that there was. Probably the defendant did not intend to renounce his claim to extra costs; but if he used expressions which would convey to the mind of the parties, that he was working on the terms that he was not to take them, he is bound. It is impossible to say that the language used did not communicate to the mind of the parties that extra costs should not be paid. It is sworn that the defendant said, “If you succeed you will have nothing to pay.” If such language was used to a person conversant with the practice of the Court, it is likely that it would not convey to him the idea that he was not to be held liable to pay extra costs. But, the jury having found that such was the understanding, there is no ground for disturbing the verdict. As to the other point. This was an action by an infant against an attorney to recover damages which had been awarded to him in an action. It was objected that the action ought to have been brought against the defendant by the father, who was the prochein amy in that suit. The action for money had and received must arise out of a rightful receipt for the use of another, or out of some wrongful act. Here the defendant did nothing wrong. The father, who was competent to do so, empowered the defendant to receive the money. The question whether the action lies is not one of fact but one of law, viz. what would be implied. It

(a) 2 P. Wms. 102, 119.

(b) 13 M. & W. 640.

was said that the implication is that the defendant received the money to the use of the father. Reasons of equal cogency were urged on the other side. It was asked what was to become of the money if the prochein amy became insolvent or died. The fact is that the money is the infant's. It seems to be the more reasonable view that the attorney received the money for the infant. That does not prevent a payment to the prochein amy from being a good payment. But it is the money of the infant. Therefore we think that the verdict was right, and the rule must be discharged.

MARTIN, B., and WATSON, B., concurred.

Rule discharged.

GILBERTSON *v.* RICHARDS and Others.

Feb. 24.

**T**HIS was an action of replevin to try the defendants' right to distrain the plaintiff's goods on certain lands for B being mortgagee in fee simple of certain lands, and the equity of redemption in fee belonging to Billings, by indenture of lease and release dated October 1838, between Billings of the first part, B. of the second part, T. of the third part, and H. of the fourth part, Billings did limit and appoint, and B. conveyed to H., and Billings confirmed, the said lands, to have and to hold the same to H., his heirs and assigns, to the use of H., his heirs and assigns, for ever, subject to a proviso for redemption by Billings, his heirs, &c., on payment of 5000*l.* Amongst other provisos there was one, that if default should be made in payment of the 5000*l.* it should be lawful for H., his heirs and assigns, to sell. This deed contained a proviso for quiet enjoyment by Billings until default. Also the following:—"Provided always, and it is hereby expressly agreed and declared between and by the parties hereto, that if at any time hereafter, when and so soon as H. and every other person claiming or to claim by, from, through or under him, shall, under or by virtue of any power or authority herein contained, enter into or upon or otherwise become possessed of the said premises, or any part thereof, the same shall from thenceforth be subjected and be charged to and with the payment to Billings and his assigns of the annual sum of 40*l.*; and the same shall thenceforth be recovered or recoverable by distress or otherwise upon or out of the mortgaged premises." This conveyance was executed by B. and Billings, but not by H. Default having been made in payment, H. entered into possession for the purpose of exercising the power of sale. And by indenture, dated in 1847, he conveyed to one A. T., who entered into possession of the lands and duly paid the 40*l.* rent.

*Held*:—First, that the charge of the rent of 40*l.* a year was not a good reservation of a rent, inasmuch as it was in favour of a person not having a legal estate in the land.

Secondly.—That there was no creation of a rent charge good at common law, because the releasee in fee simple did not execute the deed of 1838.

Thirdly.—That the rent was well created by way of use under the statute.

Fourthly.—That the declaration of this use, though after the limitation of the estate to H. and his heirs and assigns, to the use of H., his heirs and assigns, was not open to objection as being a use upon a use.

Fifthly.—That, assuming that the rent might arise at any time however distant, the limitation was not void for remoteness as tending to a perpetuity.

1859.

COLLINS  
*v.*  
BROOK.

1859.

GILBERTSON

v.

RICHARDS.

the alleged rent charge of 40*l.* hereinafter mentioned. By order of a Judge, the following case was stated for the opinion of this Court, without pleadings:—

By lease and release, dated the 27th and 28th of March, 1833, certain hereditaments were conveyed to such uses as Thomas Billings by deed should appoint, and in default of such appointment to the use of Thomas Billings for life, with the ultimate remainder to the use of Thomas Billings, his heirs and assigns, for ever.

The said lands and hereditaments comprised (amongst others) the lands and hereditaments so distrained upon.

By indentures of appointment and release, dated the 12th and 13th of April, 1833, the hereditaments conveyed to Thomas Billings by the indentures of the 27th and 28th of March, 1833, were appointed and released unto and to the use of John Howard, his heirs and assigns, as a trustee for G. Crook, for ever; to secure the said G. Crook the repayment of 3000*l.*, and subject to redemption thereof on payment by Thomas Billings of the said sum, and with a power of sale upon default.

Thomas Billings, being equitably entitled to the said hereditaments subject to the mortgage, by articles of agreement (to which neither the said mortgagee nor his trustee were parties) dated the 1st of February, 1837, in consideration of 8000*l.* to be paid as therein mentioned, agreed to sell, and P. Thompson, H. Trye and J. Baron agreed to purchase, the inheritance in fee simple of the hereditaments distrained upon, together with the rights of way, &c.: subject to the payment by the said P. Thompson, H. Trye and J. Baron, their heirs and assigns, on the 1st of January in each year, of the sum of 40*l.* towards the expense of keeping certain roads in repair. And Thomas Billings, for himself, &c., covenanted with P. Thompson, H. Trye and J. Baron, their heirs, &c., that he, his heirs or assigns,

would forthwith stone and gravel the roads, &c., and so long as the said sum of 40*l.* should continue to be paid keep the same in good order. And, further, that in case the said sum of 40*l.*, or any part thereof, should be in arrear, it should be lawful for Thomas Billings, his heirs, &c., to enter upon the land thereby agreed to be sold and take a distress for the said rent so in arrear, and the same to sell and dispose of; and otherwise to act in the premises as a landlord distraining for rent under a common demise is by law entitled to do.

A portion of the 8000*l.* was paid, but otherwise the provisions of the said articles of agreement have not been carried out, except as hereinafter appears; and the purchase and sale have long since been abandoned.

By lease and release, dated the 1st and 2nd days of March, 1838, John Howard, at the request and by the direction of George Crook, conveyed, and Thomas Billings confirmed, to Lewis Bythesea the hereditaments comprised in the indentures of the 27th and 28th of March, 1833, in fee simple, but subject to the proviso for redemption by Thomas Billings in such release contained. The release contained the usual proviso for the enjoyment of the land by Thomas Billings until default in payment.

By lease and release, dated the 24th and 25th of October, 1838, made between Thomas Billings of the first part, Lewis Bythesea of the second part, the said Thompson, Trye and Baron of the third part, and the said John Howard, D. Latimer and J. Bolton of the fourth part, after reciting that part only of the said purchase money for the said land had been paid, and that Thomas Billings, being in want of 5000*l.*, had, with the consent of the said Thompson, Trye and Baron, applied to the said J. Howard, D. Latimer and J. Bolton to advance and lend him the sum of 5000*l.* upon mortgage of the said lands, &c., which

1859.  
GILBERTSON  
v.  
RICHARDS.

1859.  
GILBERTSON  
v.  
RICHARDS.

they had agreed to do; and reciting also that Thomas Billings had requested Lewis Bythesea to release and assure such parts of the hereditaments comprised in the indenture of the 2nd of March, 1838, as were comprised in the agreement of the 1st of February, 1837, discharged from the said mortgage debt or sum of 3000*l.*, which he had agreed to do: in consideration of 5000*l.* to Thomas Billings paid by John Howard, D. Latimer and J. Bolton, Thomas Billings, with the privity of Thompson, Trye and Baron, did limit and appoint, and the said Lewis Bythesea bargained, sold and released, and Billings, with the consent of Thompson, Trye and Baron, bargained, sold, released and confirmed, to the said J. Howard, D. Latimer and J. Bolton, the lands and hereditaments distrained upon as aforesaid, to have and to hold the same unto the said John Howard, D. Latimer and J. Bolton, their heirs and assigns, to the use of the said John Howard, D. Latimer and J. Bolton, their heirs and assigns, for ever.

In the release last mentioned was contained a proviso for redemption by the said Thomas Billings on payment of 125*l.* for interest on the 25th of April, &c., and 5125*l.*, principal and interest, on the 25th of October, 1839. The said release further provided that, if default should be made in payment by the said Thomas Billings of the interest as therein mentioned, it should be lawful for the mortgagees to enter and distrain for the interest, and that if default should be made in payment of the principal, and after six calendar months' notice in writing should have been given by the mortgagees to the said Thomas Billings as in the said release mentioned, they should be at liberty to make sale and dispose of the mortgaged premises in manner therein mentioned.


The last mentioned deed of release contained the following proviso: "Provided also, and it is hereby further

expressly agreed and declared between and by the said parties hereto, *that if at any time or times hereafter, and when and so soon as the said mortgagees, and every other person or persons whomsoever claiming or to claim by, from, through or under them, should under or by virtue of any power or authority therein contained enter into or upon, or otherwise become possessed of, the said premises or any part thereof, the same should from thenceforth be subjected and charged to and with the payment to the said Thomas Billings, his heirs and assigns, of the annual sum of 40l. mentioned in the articles of agreement of the 1st of February, 1837, and that the same should thenceforth be recovered and recoverable by distress or otherwise upon or out of the said mortgaged premises or any part thereof, or the occupier or occupiers thereof, or of any part thereof, in such and the same way as rents of the like amount might be recovered or recoverable thereout upon a common demise for years.*" The last mentioned indentures of lease and release were executed by the said Thomas Billings, Lewis Bythesea, P. Thompson, H. Trye and J. Baron, but not by the other parties thereto.

It was further provided that, if default should be made in payment of the 5000l., it should be lawful for Howard, Latimer and Bolton to enter and take the rents and profits to their own use, and also that Billings should peaceably hold the said hereditaments until such default.

Default was made in payment of the mortgage money and interest; and thereupon the mortgagees entered into possession of the mortgaged premises for the purpose of exercising their power of sale, and proceeded to sell as hereinafter mentioned.

By indenture, dated the 6th of August, 1847, John Howard, Digby Latimer and John Bolton, in consideration of 5500l. paid by the said Andrew Taylor to them, conveyed the said mortgaged premises to Andrew Taylor in

1859.  
  
 GILBERTSON  
 v.  
 RICHARDS.

1859.

GILBERTSON  
v.  
RICHARDS.

fee, with all the rights of way thereunto belonging; but subject to the said annual sum of 40*l.* charged thereon.

The said indenture was executed by John Howard, Digby Latimer and John Bolton as parties thereto of the first part, but not by Andrew Taylor.

The said Andrew Taylor, under the said indenture, forthwith entered into possession of the property comprised therein.

By indenture, dated the 7th of August, 1847, Andrew Taylor conveyed the mortgaged premises so conveyed to him by the indenture of the 6th day of August, 1847, to the said John Howard, Digby Latimer and John Bolton in fee to secure the sum of 4000*l.* and interest, subject to the said annual sum of 40*l.* charged thereon and payable thereout, for the use and towards the repair of the roads and sewers, rights to use which were appurtenant to the said premises. The said indenture contained the usual proviso for redemption on payment of principal and interest, and was executed by the said Andrew Taylor only.

Andrew Taylor paid the said annual sum of 40*l.* from the time of the conveyance to him down to the 31st of December, 1854.

By indenture, dated the 18th of January, 1848, the premises comprised in the last mentioned indenture of mortgage were (subject nevertheless to the said annual sum of 40*l.* &c.) conveyed to Digby Latimer, John Bolton and William Bennett, their heirs and assigns, subject to the equity of redemption under the said indenture of the 7th of August, 1847. This indenture was executed by all the parties thereto.

By indenture, dated the 6th of December, 1854, made between Andrew Taylor of the first part, Digby Latimer, John Bolton and William Bennett of the second part, the plaintiff of the third part, and William Colleson of the

fourth part, the said mortgaged premises were appointed and conveyed to the plaintiff in fee, subject nevertheless (but so far only as the same might be legally chargeable upon or affect the said hereditaments) to the payment of the said annual sum of 40*l*.

Under this conveyance the plaintiff entered into possession of the said hereditaments and premises distrained upon, and has since then hitherto remained in possession thereof.

By lease and release, dated the 21st and 22nd of December, 1840, Thomas Billings appointed and released unto the said Cornelius Blackwell and William Billings, and their heirs, the pieces of land then used as roads or sewers, &c.; which included the roads or drives, &c., the right to the use of which was so agreed to be granted by the said articles of agreement of the 1st of February, 1837, subject to the several rights of way and sewerage theretofore granted by the said Thomas Billings, and Thomas Billings granted and assigned to Cornelius Blackwell and William Billings and their heirs the said annual sum of 40*l*. charged on and made payable out of the several hereditaments comprised in the said articles of agreement of the 1st of February, 1837, together with all powers, rights and remedies, for the recovery thereof: To hold the same unto the said Cornelius Blackwell and William Billings in fee.

By indenture, dated the 28th day of December, 1854, the said Cornelius Blackwell and William Billings granted, aliened and conveyed the said pieces of land then formed into and used as roads or drives and footpaths, &c., or comprised in lease and release of the 21st and 22nd days of December, 1840, subject as therein mentioned, and the said annual sum of 40*l*., to the defendants, their heirs and assigns, together with all powers, rights and remedies for

1859.

GILBERTSON  
v.  
RICHARDS.

1859.  
 GILBERTSON  
 v.  
 RICHARDS.

the recovery thereof, and all the estate: To have and to hold the same unto and to the use of the defendants, their heirs and assigns for ever.

The plaintiff has never paid the defendants the said annual sum of 40*l.*, and three years' arrears having been demanded a distress was levied by the defendants for the amount thereof as before mentioned.

The questions for the opinion of the Court are:—Was the rent distrained for, at the time of the distress, an existing rent charge on the plaintiff's said hereditaments and premises; and had the defendants then any right to distrain for the same? If not, the judgment of the Court is to be entered for the plaintiff for the sum of 4*l.* and costs. But if the said rent was then such existing charge and they had such right of distress, then for the defendants with costs.

*Quain* argued for the plaintiff in last Hilary Term (Jan. 26).—There was no *legal* rent charge for which a distress could be maintained. First: Thomas Billings, in whose favour the rent of 40*l.* was reserved by the indentures of the 24th and 25th October, 1838, had an equitable estate only; and the effect of the reservation was merely to create an equitable charge, so that any person who took the estate with notice of it would be liable in equity. Thomas Billings, having only the equity of redemption, was in law no more than a stranger to the estate; and a reservation of a rent to a stranger is void. In *Shep. Touch.* p. 80, it is said that a reservation “must be made to one of the grantors, and not to a stranger to the deed.” \* \* \* “And if the reservation be of the rent to a stranger that is no party to the deed, and to him only, this reservation is void; and, therefore, if the father and his son and heir apparent by indenture lease his land for years, to begin after the father's death, rendering rent to the son, it is void.” Also


in Co. Lit. 143 *b*, it is said:—"Note, it is a maxim in law that the rent must be reserved to him from whom the state of the land moveth, and not to a stranger." *Chetham v. Williamson* (*a*) and *Moore v. The Earl of Plymouth* (*b*) are authorities to the same effect.—Secondly, the indentures of the 24th and 25th October, 1838, cannot operate as a grant of a rent charge by the mortgagees, because they did not execute the deed: *Wickham v. Hawker* (*c*). Besides, the stipulation that, in the event of the mortgagees taking possession, the land shall be charged with the payment of the annual sum of 40*l.*, does not amount to a reservation or grant of a rent charge, but is a mere agreement; whereas every good reservation must be by apt words: Shep. Touch. 80. It will perhaps be argued that although the grantees did not execute the indentures, yet, as they entered into possession, they accepted the land subject to the payment of the yearly sum; and the following passage in Co. Lit. 143 *b*, may be relied on:—"And it is holden that if a feoffment in fee be made by deed poll reserving a rent, this reservation is good; for when the feoffee accepts the deed and livery of the land, he agreeth to the rent, and the rent is reserved by the words of the feoffor, and not by the grant of the feoffee." That might be so here if the rent was properly reserved. Moreover, the case finds that the mortgagees only entered into possession for the purpose of exercising the power of sale.

*Mathew*, for the defendant.—First: Thomas Billings was not a stranger to the estate, but under the release of the 2nd March, 1838, he had a legal interest as tenant. In a note to *Partridge v. Bere* (*d*) it is said:—"If, in the mortgage deed, there is the usual proviso for the enjoyment of the land

1859.

GILBERTSON  
v.  
RICHARDS.

(*a*) 4 East, 469.(*b*) 3 B. & Ald. 66.(*c*) 7 M. & W. 63.(*d*) 5 B. & Ald. 604.

1859.  
  
 GILBERTSON  
 v.  
 RICHARDS.

by the mortgagor and his heirs until default in payment, &c., and the mortgagor is in actual possession, he may, under the agreement, be regarded as *tenant for years* to the mortgagee during the continuance of the agreement:" *Powsely v. Blackman* (a). That doctrine was recognised in *Wilkinson v. Hall* (b). In *Freeman v. Edwards* (c), Parke, B., said:—"If there is any definite time during which the mortgagor is to remain in possession, that operates as an interest in him; but if the time is indefinite, his occupation is merely permissive." Therefore Thomas Billings, when he joined in the conveyance of the 24th and 25th October, 1838, was not a stranger within the technical rule which renders the reserval of a rent to him void. [*Martin*, B.—If a rent could be reserved to a stranger, the consequence would be that the grantee might distrain another man's goods for payment of the debt of the grantor; but no person can lawfully grant a power to take another's goods.] In Gilbert on Rents, p. 54, it is said:—And here Littleton's text is to be laid down as a sure rule, "that no rent (which is properly called rent) may be reserved upon any feoffment, gift or lease, but only to the feoffor, donor, lessor or to their heirs; and in no manner may it be reserved to any stranger. And the reason of the rule is this; because the rent is something paid by way of retribution for the land; and therefore ought to be made to him from whom the land passes. Besides, the reservation to a stranger was prohibited to avoid the danger of maintenance; for if they were allowable, persons might make reservations to powerful men, who might extort more from the tenant than was originally contracted for."—Secondly, although the releases did not execute the indentures of the 24th and 25th October, 1838, the acceptance of the estate estops them

(a) Cro. Jac. 659.

(b) 3 Bing. N. C. 508.

(c) 2 Exch. 732, 737.

from denying that a valid rent charge was created. In Lit. 230 *b*, it is said:—"If an estate be made by indenture to one for the term of his life, the remainder to another in fee upon a certain condition, &c., if the tenant for life have put his seal to the part of the indenture and after dieth, and he in the remainder entreth into the land by force of his remainder, &c., in this case he is tied to perform all the conditions comprised in the indenture, as the tenant for life ought to have done in his life, and yet he in remainder never sealed any part of the indenture. But the cause is, for that inasmuch as he entered and agreed to have the lands by force of the indenture, he is bound to perform the conditions within the indenture, if he will have the land," &c. A man may be bound by the covenants of a deed in which he is described as a party, though he does not execute it, if he assent to it and take a benefit under it: Co. Lit. 231 *a*, *Webb v. Spicer* (*a*). Thus, where a covenantor executes, but the covenantee does not, the latter by bringing an action gives his consent to the contract, and the covenantor having consented by executing the deed, there is the consent of both parties: *Wetherell v. Langston* (*b*). By the 8 & 9 Vict. c. 106, s. 5, under an indenture executed after the 1st October, 1845, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant "respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture."—Thirdly, the mortgagees were seised of the lands to the intent that Thomas Billings might have a rent thereout. Under the Statutes of Uses that is sufficient to create a valid rent charge. In a note by Lord *St. Leonards*

1859.

GILBERTSON  
v.  
RICHARDS.

(a) 13 Q. B. 886.

(b) 1 Exch. 634. 643.

1859.  
 GILBERTSON  
 v.  
 RICHARDS.

to Gilbert on Uses, p. 193, it is said:—"Where any person stands seised of any lands to the use that some other person may receive a rent thereout, the statute executes the use in the same manner as if a sufficient grant had been made to him by the person seised to the use, and gives the cestui que use a power of distress." Whatever may be the form of a deed, if the intent of the parties is manifest the Court will give effect to it; for it is an established rule that a deed shall never be laid aside as void, if by any construction it can be made good: *Earl of Clanrickard's Case* (a), Shep. Touch. 82, 83. Thus, a deed which could not operate as a bargain and sale because there was no money consideration, nor as a release because there was no lease for a year, nor as a deed of confirmation because the grantees were neither of them in possession, nor as a feoffment because there was no livery of seisin was held to operate as a covenant to stand seised: *Doe v. Assignees of Simpson* (b), 2 Wms. Saund. p. 97, note. Here the intention is clear, that there should be a rent charge recoverable by distress and not a mere equitable charge. *Perry v. Watts* (c) and *Haggerston v. Hanbury* (d) also shew that the Court will construe a deed so as to give effect to it, where the intention is manifest that an estate should pass, though it cannot pass in the way the parties intended. The language of the deed is sufficient to raise a use. "A man made a feoffment *sub conditione eâ intentione* that his wife should have lands for life, remainder to his youngest son in fee. The feoffee died without making any estate. The heir of the feoffor entered, but it was resolved that there was not a condition, but an use, which was executed presently according to the intent:" Shep. Touch. p. 514.

(a) Hob. 277.

(b) 2 Wils. 22; S. C. Willes, 673.

(c) 3 M. & G. 775.

(d) 5 B. & C. 101.

*Quain*, in reply, referred to 1 Smith's Lead. Cas. p. 444,  
*Doe d. Roylance v. Lightfoot* (a).

1859.  
 GILBERTSON  
 v.  
 RICHARDS.

The Court directed that the case should be further argued on the point as to the operation of the Statute of Uses, and on a subsequent day (Feb. 12)

*Mathew* argued for the plaintiff.—The proviso in the indenture of 1838 is a good declaration of a use in favour of Thomas Billings, his heirs and assigns. The instrument will operate according to the *effect* which the parties intended to give to it: Sheppard's Touchstone, by Preston, p. 514, Sanders on Uses, p. 95, citing *Boydell v. Walthall* (b). "Any expression whereby the mind of the party may be known that such a one shall have the land is sufficient:" per *Holt*, C. J., in *Jones v. Morley* (c). No special words are necessary to create a use. It may be objected that, there being a use declared by the deed to the mortgagees, a further use could not be declared of the rent to Billings. But an exception to the general rule, that a use cannot be declared upon a use, was established in *Cromwell's Case* (d), where a recovery was suffered of lands to the use of A. and his heirs, yielding for the same a rent to B.; and it was urged that the rent ought to have been limited out of the estates of the recoverors, and not out of the possession of cestui que use; yet it was determined that the rent was well executed by the statute.—He referred also to Gilbert on Uses, pp. 194 (note), 351 (note), and Sanders on Uses, p. 275.

The Court then called on


*Quain*.—By the indentures of the 24th and 25th of

(a) 8 M. & W. 553. 564.

(c) 12 Mod. 159. 162.

(b) Moore, 722.

(d) 2 Rep. 69 a.


1859.  
  
 GILBERTSON  
 v.  
 RICHARDS.

October, 1838, the premises are conveyed to the releasees and their heirs, to hold unto the releasees and their heirs to the use of the releasees and their heirs, subject to the equity of redemption. Now, though the second use is not executed by the statute, it prevents any other use being declared, unless the case of a rent charge is an exception. In *Sanders on Uses*, p. 89, it is said: "The statute says, that where any person or persons stand or be seised &c. to the use, confidence or trust of any *other* person or persons," &c., and therefore if a use be limited to a feoffee, conusee, recoveror or releasee, such use, generally speaking, is not executed by the statute, but the feoffee, &c. is in by the common law. In this case, notwithstanding the grantee is in by the *common law*, yet after the declaration of the use to him he has not only a seisin but a *use*, although not the use which the statute require; and therefore that seisin, which before the limitation of the use to himself was open to serve uses declared to a third person, is by the limitation filled up, and will not admit of any other use being limited in it, upon the principle that a use cannot be limited upon a use:" see also pp. 166, 167. The rent charge is said to be good by way of springing use; but there is no seisin to serve it, the seisin being exhausted by the first declaration of use. In *Cromwell's Case* (a) the reservation of rent came after the declaration of uses, and the Court held the reservation good, *ut res magis valeat, quam pereat*. But the explanation of that case is to be found in *Cholmley's Case* (b) where Baron *Ewens* points out that if the use and possession pass *tanquam uno flatu*, it is all one with a grant of the land itself; "for if the use should pass first, then rent cannot be reserved out of the use, and then the reservation of the rent would be void."—Next, the charge of the rent is within the rule against perpetuities. The proviso is that as soon as the mortgagees,

(a) 2 Rep. 69 a.

(b) 2 Rep. 54 a.

or other person claiming under them, shall enter, the premises are to be charged with the rent; Billings is to have possession until default. At the time of the execution of the deed it was uncertain whether Billings ever would make default. If he did make default, still it was uncertain whether the mortgagees would ever enter. This, therefore, was an estate to begin at a future time, which might or might not have taken effect within a life or lives in being and twenty one years after. It is a rule that springing uses are confined to the limits of time prescribed by courts of justice for preventing perpetuities: 1 Sanders on Uses, p. 201. In Gilbert on Rents, p. 60, the author questions "at what distance of time charges of rent may be allowed to commence, whether it must not be after the lives of persons *in esse*; for if they be indefinite they seem to have the same tendency to a perpetuity as any contingent remainder or executory interest: and the bare affection of a perpetuity is sufficient to damn any conveyance." In Gilbert on Uses, p. 195 (note), it is said, "A new rent may be limited to commence *in futuro* within the line of perpetuity." The conclusion drawn by Mr. Lewis, after consideration of the authorities, is that a rent charge granted independently by the proprietor of the soil, or reserved to him in, or in consideration of a disposition of the fee, must be observant of the limits of perpetuity. Assuming, then, that a rent charge is subject to the rule against perpetuities, it is not sufficient, in order to test the legality of a limitation within this rule, to inquire whether it be capable of taking effect within the period prescribed by the rule; it must be so framed as *ex necessitate* to take effect, if at all, within that period: Lewis on Perpetuities, p. 170. In an opinion of Mr. Hodgson, quoted in Lewis on Perpetuities, Appendix, p. xxxv., it is said that the rule is, that "any grant or limitation (of a rent charge) shall be void if it is not, in

1859.  
  
 GILBERTSON  
 v.  
 RICHARDS.

1859.  
 GILBERTSON  
 v.  
 RICHARDS.

point of fact, certain, at the time of creating it, that it will attach within some defined period of a life in being and twenty one years." The rule was much discussed in *The Duke of Norfolk's Case* (a) and in *Stephens v. Stephens* (b).—Lastly, the event on which the rent was to be charged on the land never took place, because, in fact, the mortgagees never entered.

*Mathew* in reply.—The mortgagees entered to exercise the power of sale, and the vendee entered by their authority. The rent is not within the policy or the letter of the rule against perpetuities. It was a present charge of a contingent rent, always capable of being defeated by the beneficial owner, and therefore not open to the suggested objection: *Lewis on Perpetuities*, pp. 560, 561. It is similar to a power to sell real estate, to be exercised without any restriction in point of time. This, though void if regarded abstractedly from its purposes and objects, would undoubtedly be held good: *Lewis on Perpetuities*, p. 558. If the rent was limited to an unascertained person, the estate could not be dealt with. Here however, it was at any time capable of being released by Billings or his heirs. The present case ranges itself within the exception to the rule mentioned in *Lewis on Perpetuities*, p. 501, that where a limitation is made to take effect on two alternative events, one of which is too remote, and the other valid as within the prescribed limits, although the gift be void so far as it depends on the remote event, it will be allowed to take effect on the happening of the alternative one. *Biddle v. Perkins* (c), *Boyce v. Hanning* (d), *Longhead v. Phelps* (e) and *Monypenny v. Deering* (f) are instances of the application of a similar

(a) 3 Chan. Cas. 1.

(b) Cases temp. Talbot, 228.

(c) Hargr. Accum. 93, 94, n.

(d) 2 C. & J. 334.

(e) 2 W. Bl. 704.

(f) 2 De Gex, M'N. & G. 145.

principle. Here the rent was to arise on the execution of the power of sale, and the trustees did enter and sell.

*Cur. adv. vult.*

1859.  
GILBERTSON  
v.  
RICHARDS.

---

The judgment of the Court was now delivered by

MARTIN, B.—This is a special case for the opinion of the Court in an action of replevin, and the question is whether the rent hereinafter mentioned was an existing rent for which the defendants had a right to distrain.

The material facts are these :—Lewis Bythesea was mortgagee in fee simple of the lands distrained upon. Thomas Billings was owner of the equity of redemption, also in fee ; and by indentures of lease and release, dated the 24th and 25th of October, 1838, made between Thomas Billings of the first part, Lewis Bythesea of the second part, Pearson Thompson and others of the third part, and John Howard, Digby Latimer and John Bolton of the fourth part ; after reciting, amongst other things not material, that Thomas Billings was in want of 5000*l.* upon mortgage of the said lands, which the parties of the fourth part had agreed to lend ; and that Lewis Bythesea had agreed to release and assure to them the said lands freed and discharged from his mortgage : The indenture witnessed, that Lewis Bythesea conveyed, and Thomas Billings granted and confirmed, the said lands : To have and to hold the same to the parties of the fourth part, their heirs and assigns, to the use of them, &c., their heirs and assigns, for ever ; subject to a proviso for redemption on payment of the 5000*l.* and interest. Amongst other provisos there was one, that if default should be made in payment of the 5000*l.* and interest at the time appointed, and after six months' notice in writing had been given by the parties of the fourth part, their

1859.  
GILBERTSON  
v.  
RICHARDS.

heirs, &c., to Thomas Billings to pay, and payment not being made, it should be lawful for the parties of the fourth part, their heirs, &c., to make sale of the said lands, &c. The release also made provision in the event of the parties of the fourth part, their heirs, &c., or any other person or persons claiming, or to claim by, from, under or in trust for them, under or by virtue of any power therein contained, entering into or otherwise becoming possessed of the lands. In which event it was provided and *expressly agreed and declared between and by all the parties to the deed*, that from and immediately after the said lands should have been so entered into, or possessed by the said parties of the fourth part, their heirs, &c., or any other person, or persons as aforesaid, the same should from thenceforth for ever thereafter be, and the same were from thenceforth subjected and charged with and to the payment, to the said Thomas Billings, his heirs and assigns, of the annual sum of 40*l*. mentioned in articles of agreement of the 1st of February, 1837, and the same should thenceforth be recovered and recoverable by distress or otherwise upon and out of the said lands, in such and in the same way as rents of the like amount might be recovered and recoverable upon a common demise for years. This conveyance was executed by Mr. Bythessea and Mr. Billings, but not by the parties of the fourth part. The articles of agreement of the 1st of February, 1847, are set out in the case, and they were made between Thomas Billings of the first part, and the parties to the said conveyance of the third part, whereby the former, being owner of an equity of redemption, agreed to sell to the latter the said lands for 5,000*l*, subject to the payment of 40*l* a year towards the expenses of keeping in repair certain roads. The intended purchase was afterwards abandoned, but the 40*l*. rent or annual charge mentioned in these articles is the same referred to in the release.

Default was made in payment of the mortgage money and interest, and thereupon the mortgagees, the parties of the fourth part, *entered into possession* for the purpose of exercising their power of sale; and by indenture, dated 6th of August, 1847, they conveyed the said lands to Andrew Taylor for 5,500*l.*, subject to the said annual sum of 40*l.* Andrew Taylor afterwards entered into possession of the lands, and duly paid the said annual sum of 40*l.* to the 31st of December, 1854. By an indenture of the 5th of December, 1854, the lands were conveyed to the plaintiff, in fee simple, upon a purchase by him, subject to the payment of the said annual sum of 40*l.* (but so far only as the same might be legally chargeable upon or affect the said lands). The case then sets out some indentures whereby the said rent, or annual sum of 40*l.* has become vested in the defendants. The plaintiff neglected to pay the rent or annual sum for three years, viz., from December, 1854, to December, 1857. The distress in question was made by the defendants upon the plaintiff's goods, and the question before us is whether it was lawful.

It was objected, on behalf of the plaintiff, that the charge of the 40*l.* a year was not a good reservation of a rent, inasmuch as it was made in favour of Thomas Billings, the owner of the equitable estate, whilst by law a good reservation of rent can only be made to the legal owner. Several authorities were cited, *Shep. Touch.* 80, *Co. Litt.* 143, b., *Chetham v. Williamson* (a), *Wickham v. Hawker* (b); and the point is clear; indeed it was scarcely disputed by the learned counsel for the defendants.

Secondly, it was objected that there was no grant of a rent charge, because the releasees in fee simple did not execute the deed of October 1838. This also is a clear objection.

(a) 4 East, 469.

(b) 7 M. &amp; W. 63.

1859.  
  
 GILBERTSON  
 v.  
 RICHARDS.

1859.  
 GILBERTSON  
 v.  
 RICHARDS.

heirs, &c., to Thomas Billings  
 being made, it should be lawful  
 part, their heirs, &c., to r  
 The release also made for  
 of the fourth part, to  
 persons claiming, r  
 them, under or  
 entering into  
 In which  
*declared*  
 and :  
 er

defendants that the  
 that where a person  
 another person may  
 executes the use as if a  
 by the person seised to the  
 use a power of distress: Lord  
 Gilbert on Uses, p. 193, *Cromwell's*  
 , and that such new rent may be limited  
 In futuro: Same note, p. 195, *Fearne on Re-*  
*declared*  
 p. 528; and that in order to create a use no tech-  
 words are necessary; and that it is only essential to  
 that the intention was that the party should have the  
 interest or estate; that regard is to be had to the mind and  
 intention of the parties; and whatever may be the words,  
 the interest will operate according to the effect which the  
 parties intend to give it: *Shep. Touch.* 514. And, subject  
 to the objections hereafter mentioned, we think these prin-  
 ciples apply.

The parties to the conveyance by lease and release of the 25th of October, 1838, distinctly agree and declare, that forthwith after the parties of the fourth part, or any one claiming by, from or under them, should enter into the lands (which both they themselves and Andrew Taylor, the purchaser from them, did), the lands should thenceforth for ever be subjected and charged with a payment to Thomas Billings, his heirs and assigns, of the annual sum of 40*l.*, to be recovered and recoverable by distress. This is a clear declaration of intention that Thomas Billings should, upon the event mentioned, have a rent of 40*l.* a year in fee simple.

But two objections were made by the learned counsel for the plaintiff: first, that the habendum, being to the parties of the fourth part, their heirs and assigns, to the use of the said parties of the fourth part, their heirs and assigns for ever, no use could be afterwards created or limited. It is

1859.

GILBERTSON  
v.  
RICHARDS.

re in the law can be created after a use. In and his heirs, to the use of A. and his rates upon the use and exhausts its 'al estates in the land itself declared 'table estates or trusts; but this new estate. It is fed out of the heirs, and is a legal estate by virtue of Uses. It is precisely the same case as a rent out of the estate of the bargainee upon a bargain and sale. He is seised by virtue of the statute: the use to himself is the first use, and any beneficial estate declared upon his seisin is a trust: Shep. Touch. p. 510; but a rent may be declared out of his estate and will not be deemed a use upon a use: Lord *St. Leonards'* note to Gilbert on Uses, p. 347. This objection therefore fails.

The second objection was that it was void for remoteness; that it was to arise at any time, however distant, when the parties of the fourth part, or their heirs, might enter into the land, and therefore might arise long after the time prescribed by law against perpetuity. It is quite true that no rent can be lawfully created which violates the law against remoteness, and therefore a rent could not be granted to the son of an unborn son. But it seems to be an error to call this rent a perpetuity, in an illegal sense. It is vested in Thomas Billings and his heirs. He or his heirs may sell it, or release it, at their pleasure. A rent in fee simple may be granted to a man and heirs to continue for ever. Why, therefore, may not one be granted to commence at any time however remote? It is only a part of the estate in fee simple of the rent. A perpetuity arises when a rent is granted to a person who may not be in esse until after the line of perpetuity be passed; but when the estate in the rent is vested in an existing person and his heirs in fee simple, who may deal with it at his or their pleasure, and as

1859.

GILBERTSON  
v.  
RICHARDS.


But it was argued on behalf of the defendants that the rent was well created by way of use ; for that where a person stands seised of lands to the use that another person may receive a rent thereout, the statute executes the use as if a grant had been made of the rent by the person seised to the use, and gives the cestui que use a power of distress : Lord *St. Leonard's* note to Gilbert on Uses, p. 193, *Cromwell's Case*, 2 Rep. 72, b ; and that such new rent may be limited to commence in futuro : Same note, p. 195, *Fearne on Remainders*, p. 528 ; and that in order to create a use no technical words are necessary ; and that it is only essential to shew, that the intention was that the party should have the interest or estate ; that regard is to be had to the mind and intention of the parties ; and whatever may be the words, the interest will operate according to the effect which the parties intend to give it : *Shep. Touch.* 514. And, subject to the objections hereafter mentioned, we think these principles apply.


The parties to the conveyance by lease and release of the 25th of October, 1838, distinctly agree and declare, that forthwith after the parties of the fourth part, or any one claiming by, from or under them, should enter into the lands (which both they themselves and Andrew Taylor, the purchaser from them, did), the lands should thenceforth for ever be subjected and charged with a payment to Thomas Billings, his heirs and assigns, of the annual sum of 40*l.*, to be recovered and recoverable by distress. This is a clear declaration of intention that Thomas Billings should, upon the event mentioned, have a rent of 40*l.* a year in fee simple.

But two objections were made by the learned counsel for the plaintiff: first, that the habendum, being to the parties of the fourth part, their heirs and assigns, to the use of the said parties of the fourth part, their heirs and assigns for ever, no use could be afterwards created or limited. It is

quite true, no use in the law can be created after a use. In a conveyance to A. and his heirs, to the use of A. and his heirs, the statute operates upon the use and exhausts its operation, and all beneficial estates in the land itself declared upon such a seisin are equitable estates or trusts; but this is not so with a rent, it is a new estate. It is fed out of the seisin of A. and his heirs, and is a legal estate by virtue of the Statute of Uses. It is precisely the same case as a rent declared out of the estate of the bargainee upon a bargain and sale. He is seised by virtue of the statute: the use to himself is the first use, and any beneficial estate declared upon his seisin is a trust: *Shep. Touch.* p. 510; but a rent may be declared out of his estate and will not be deemed a use upon a use: Lord *St. Leonards'* note to Gilbert on Uses, p. 347. This objection therefore fails.

The second objection was that it was void for remoteness; that it was to arise at any time, however distant, when the parties of the fourth part, or their heirs, might enter into the land, and therefore might arise long after the time prescribed by law against perpetuity. It is quite true that no rent can be lawfully created which violates the law against remoteness, and therefore a rent could not be granted to the son of an unborn son. But it seems to be an error to call this rent a perpetuity, in an illegal sense. It is vested in Thomas Billings and his heirs. He or his heirs may sell it, or release it, at their pleasure. A rent in fee simple may be granted to a man and heirs to continue for ever. Why, therefore, may not one be granted to commence at any time however remote? It is only a part of the estate in fee simple of the rent. A perpetuity arises when a rent is granted to a person who may not be in esse until after the line of perpetuity be passed; but when the estate in the rent is vested in an existing person and his heirs in fee simple, who may deal with it at his or their pleasure, and as

1859.  
  
 GILBERTSON  
 v.  
 RICHARDS.

1859.  
  
 GILBERTSON  
 v.  
 RICHARDS.

But it was argued on behalf of the defendants that the rent was well created by way of use ; for that where a person stands seised of lands to the use that another person may receive a rent thereout, the statute executes the use as if a grant had been made of the rent by the person seised to the use, and gives the cestui que use a power of distress : Lord *St. Leonard's* note to Gilbert on Uses, p. 193, *Cromwell's Case*, 2 Rep. 72, b ; and that such new rent may be limited to commence in futuro : Same note, p. 195, *Fearne on Remainders*, p. 528 ; and that in order to create a use no technical words are necessary ; and that it is only essential to shew, that the intention was that the party should have the interest or estate ; that regard is to be had to the mind and intention of the parties ; and whatever may be the words, the interest will operate according to the effect which the parties intend to give it : *Shep. Touch.* 514. And, subject to the objections hereafter mentioned, we think these principles apply.

The parties to the conveyance by lease and release of the 25th of October, 1838, distinctly agree and declare, that forthwith after the parties of the fourth part, or any one claiming by, from or under them, should enter into the lands (which both they themselves and Andrew Taylor, the purchaser from them, did), the lands should thenceforth for ever be subjected and charged with a payment to Thomas Billings, his heirs and assigns, of the annual sum of 40*l.*, to be recovered and recoverable by distress. This is a clear declaration of intention that Thomas Billings should, upon the event mentioned, have a rent of 40*l.* a year in fee simple.

But two objections were made by the learned counsel for the plaintiff: first, that the habendum, being to the parties of the fourth part, their heirs and assigns, to the use of the said parties of the fourth part, their heirs and assigns for ever, no use could be afterwards created or limited. It is

quite true, no use in the law can be created after a use. In a conveyance to A. and his heirs, to the use of A. and his heirs, the statute operates upon the use and exhausts its operation, and all beneficial estates in the land itself declared upon such a seisin are equitable estates or trusts; but this is not so with a rent, it is a new estate. It is fed out of the seisin of A. and his heirs, and is a legal estate by virtue of the Statute of Uses. It is precisely the same case as a rent declared out of the estate of the bargainee upon a bargain and sale. He is seised by virtue of the statute: the use to himself is the first use, and any beneficial estate declared upon his seisin is a trust: *Shep. Touch.* p. 510; but a rent may be declared out of his estate and will not be deemed a use upon a use: Lord *St. Leonards'* note to Gilbert on Uses, p. 347. This objection therefore fails.

The second objection was that it was void for remoteness; that it was to arise at any time, however distant, when the parties of the fourth part, or their heirs, might enter into the land, and therefore might arise long after the time prescribed by law against perpetuity. It is quite true that no rent can be lawfully created which violates the law against remoteness, and therefore a rent could not be granted to the son of an unborn son. But it seems to be an error to call this rent a perpetuity, in an illegal sense. It is vested in Thomas Billings and his heirs. He or his heirs may sell it, or release it, at their pleasure. A rent in fee simple may be granted to a man and heirs to continue for ever. Why, therefore, may not one be granted to commence at any time however remote? It is only a part of the estate in fee simple of the rent. A perpetuity arises when a rent is granted to a person who may not be in esse until after the line of perpetuity be passed; but when the estate in the rent is vested in an existing person and his heirs in fee simple, who may deal with it at his or their pleasure, and as

1859.  
  
 GILBERTSON  
 v.  
 RICHARDS.

1859.

GILBERTSON  
v.  
RICHARDS.

he or they think fit, we think it is not subject to the objection of remoteness, notwithstanding that its actual enjoyment may depend upon a contingency which may never happen, or may happen at any time however distant. For these reasons we think the rent was well created, and that the distress for it was lawful.

Judgment for the defendant.

Feb. 12.

SEMPLE v. NICHOLSON.

An unstamped warrant of attorney is not available at law or in equity; and the Court will not allow it to be taken off the file for the purpose of being stamped, so as to give it a priority over a subsequent judgment creditor who has filed a stamped warrant of attorney.

In future no warrant of attorney permitted to be filed without a proper stamp.

IN this case judgment had been entered up by the plaintiff against the defendant on five warrants of attorney. The last judgment was entered up on the 26th January, 1856. All these warrants of attorney were filed without stamps. On the 20th August, 1856, one Mawson entered up judgment against the defendant on a warrant of attorney which was filed with a proper stamp. The plaintiff's attorney had frequently filed warrants of attorney without any stamp upon them, and on several occasions the clerk of the judgments had remonstrated with him for so doing; but he persisted in filing them, and said that he would do so at his own personal risk. It appeared that unstamped warrants of attorney had also been occasionally filed by other attornies.

*Lush* moved for a rule to shew cause why the warrants of attorney should not be taken off the file for the purpose of being stamped (Jan. 31).—The Court has power to allow the warrants of attorney to be stamped. The 13 & 14 Vict. c. 97, s. 12, after reciting that, “for securing the due payment of the stamp duties imposed by law on deeds and other instruments, it is expedient to alter the terms and

conditions on which any such deed or instrument may be stamped after the execution or signing thereof," enacts, that where any deed or instrument liable to stamp duty shall be executed before it is stamped, there shall be paid over and above the stamp duty by way of penalty the sum of 10*l.*; and where the duty shall exceed the sum of 10*l.* there shall be paid by way of penalty, in addition to the said sum of 10*l.*, interest on the duty at the rate of 5 per cent. per annum from the date of execution of the deed or instrument." The Commissioners are then expressly required, on payment of the duty and penalty, to cause the deed or instrument to be stamped. The section proceeds to say that "no such deed or instrument shall be pleaded or given in evidence, or admitted to be good, useful or available in law or equity, until the same shall be duly stamped as aforesaid." Then follows a proviso, that where it shall appear to the Commissioners, "upon oath or otherwise, to their satisfaction, that any deed or instrument has not been duly stamped previously to its being executed, by reason of accident, mistake, inadvertency, or urgent necessity, and without any wilful design or intention to defraud her Majesty, &c., of the duty chargeable in respect thereof, or to evade or delay the payment of such duty, then and in any such case, if such deed or instrument shall within twelve calendar months after the first signing or executing of the same by any person, be brought to the said Commissioners in order to be stamped, and the stamp duty chargeable thereon by law shall be paid," the Commissioners may, if they think fit, remit the penalty, and thereupon every such deed or instrument shall be as valid and available in law as it would have been if it had been duly stamped before the signing or executing of the same. The first branch of the section provides for a wilful omission to stamp the document, and in that case a penalty is imposed; but

1859.

SEMPLE  
v.  
NICHOLSON.

1859.

SEMPLE  
v.  
NICHOLSON.



where the neglect to stamp has arisen from mere inadvertence, the Commissioners may remit the penalty. The 5 & 6 Wm. & M. c. 21, s. 11, contained a provision in the same terms as the 13 & 14 Vict. c. 97, s. 12, that no unstamped document should be available in law or equity, but, under the former Act, the Courts allowed unstamped instruments to be taken off the file to be stamped. [*Channell*, B.—In *Clarke v. Jones* (a) the Court refused to grant a rule for setting aside a cognovit, at the instance of the defendant, because it was not stamped. *Parke*, B., there said:—"The objection to the stamp would be of no avail, as they could get it stamped before cause was shewn."] That case is an authority that, if this application had been merely opposed by the defendant, the Court would have granted the rule. Then what locus standi has a third party? [*Pollock*, C. B.—Is there any authority that the Court will grant an application like this to the prejudice of a third person who has filed a stamped warrant of attorney, and thereby got a valid security for his debt. *Channell*, B.—In *Newland v. Watkin* (b), where the Court set aside a warrant of attorney which operated to charge an ecclesiastical benefice, upon the application of a person who had a subsequent warrant of attorney, the 13 Eliz. c. 20, s. 1, rendered the former warrant of attorney utterly void.] It has been the constant practice to file unstamped warrants of attorney. In Archb. Pract. p. 887, 9th ed., it is said:—"But although the warrant be not stamped at all, or be improperly stamped and therefore unavailable, yet it may be made available on payment of the penalty and getting a proper stamp fixed; and this may be done even after a rule nisi obtained to set aside a judgment on the warrant for the want of or defect in the stamp." Courts of equity have recognised the distinction between an agreement that may

(a) 3 Dow. P. C. 277.

(b) 9 Bing. 113.

be stamped on payment of the penalty, and one on which no action can be brought unless stamped: *Huddleston v. Bristow* (a). [*Martin*, B., referred to *Pitman v. Humfrey* (b).]

1859.  
 SEMPLE  
 v.  
 NICHOLSON.

*Hawkins* and *Field*, for Mawson, shewed cause in the first instance, and also moved to set aside the unstamped warrants of attorney.—The unstamped warrants of attorney are void as against a third party who has filed a stamped warrant of attorney: *Harrod v. Benton* (c), *Martin v. Martin* (d). The provision in the 13 & 14 Vict. c. 97, s. 12, which enables the Commissioners to cause an unstamped instrument to be stamped within twelve months after its execution, without payment of the penalty, where the omission to stamp has arisen from inadvertence, does not apply to this case, for here there was a wilful omission to stamp, for the plaintiff's attorney was informed by the officer that he ought not to file the warrants of attorney without their being stamped, and he said that he would do so on his own responsibility. Then the statute expressly says that no unstamped deed or instrument shall be good, useful, or available in law or equity. In defiance of that enactment, the plaintiff has filed these warrants of attorney, and seeks to set up the judgments signed upon them as valid in law. [*Martin*, B.—The statute says that “no such deed or instrument shall be *pleaded*.” Could profert have been made of it before The Common Law Procedure Act, 1852?] According to the words of the Act, an unstamped instrument is not available for any purpose. (*Lush* referred to *Rogers v. James* (e)). The judgments were entered up on warrants of attorney which the statute has declared were invalid, and the stamping

(a) 11 Ves. 595.

(b) 2 Tyr. 500.

(c) 8 B. & C. 217.

(d) 3 B. & Adol. 934.

(e) 2 Marsh. 425.

1859.

SEMPLE  
v.  
NICHOLSON.

these warrants of attorney cannot give the judgments a retrospective effect. *Reardon v. Swaby* (a) and *Pitman v. Humfrey* (b) shew that these judgments are irregular and invalid. The authorities relied on by the other side only amount to this, that where an application is made to set aside an unstamped instrument, and at the time of shewing cause it is produced with the proper stamp affixed, the Court will not inquire when it was stamped.

*Lush*, in reply.—The latter part of the clause, which says that “thereupon every such deed or instrument shall be as valid and available in law as it would have been if it had been duly stamped before the signing or executing of the same,” applies to the whole enactment. The judgments are not void. [*Martin*, B.—In *Reardon v. Swaby* (a) the Court set aside the judgment.] In *Tilsley on Stamps*, p. 326, an *Anonymous Case* (c) is referred to, where “the Court observed that there might be reason for refusing such a warrant of attorney in evidence, but none for making it void; for that there was nothing in the Act importing it.” A third party, who may be prejudiced by a judgment against his debtor, cannot object that no attorney attested the execution of the warrant of attorney on which such judgment is founded: *Chipp v. Harris* (d). So here it is not competent for a third party to object that these warrants of attorney are not stamped. It would be a hardship on the plaintiff, who is an innocent party, if he were to suffer from the act of his attorney in filing the unstamped warrants of attorney.

*Cur. adv. vult.*

POLLOCK, C. B.—In this case Mr. *Lush* moved for a

(a) 4 East, 188.

(b) 2 Tyr. 500.

(c) 2 Salk. 612.

(d) 5 M. & W. 430.

rule to take five warrants of attorney off the file for the purpose of their being stamped. Against that rule cause was shewn in the first instance by Mr. *Hawkins* on behalf of a person who had entered up judgment on a warrant of attorney which was stamped, but which judgment was subsequent to the judgments entered up on the five warrants of attorney, and which Mr. *Hawkins* also moved to set aside. The question is, in what way is the Court to deal with these two applications? Undoubtedly, there are instances in which applications have been made to remove warrants of attorney from the file for the purpose of being stamped, and the argument presented to us has certainly this weight in it, that by the 13 & 14 Vict. c. 97, s. 12, a party is entitled to have an instrument stamped within a certain time without the payment of a penalty, and after a certain time on payment of a penalty, which seems to be annexed as a right or privilege given to the subject without any other condition being imposed. The enactment also enables the Commissioners of Inland Revenue to stamp a document within twelve months after its execution without the payment of a penalty, if the Commissioners are satisfied that there has not been any intention to defraud the Crown of the duty. Here, however, there was nothing which would justify them in granting that indulgence. It was argued by Mr. *Lush* that the Legislature contemplated the stamping of documents after their execution, and that they had provided for what may be called the indifference of persons to the revenue laws. This Court, however, has a very different duty to perform from that which belongs to the Commissioners of Inland Revenue. In this case we find that a party obtained a valid judgment on a warrant of attorney after judgments had been entered up on the five unstamped warrants of attorney, and the effect

1859.

SEMPLE  
v.  
NICHOLSON.

1859.  
SEMPLE  
v.  
NICHOLSON.

of taking those warrants of attorney off the file and getting them stamped would be to defeat the valid judgment; and I think we ought to hold, in the language of the legislature, that an unstamped document shall not be "good, useful or available in law or equity." We ought to look at the legal rights of the parties; and we find that one has obeyed the law and obtained a judgment "good, useful and available in law and equity," while the other has broken the law, for the law says that documents shall be stamped before execution; and the permission to stamp them afterwards is an indulgence, although it may be claimed as a right when it does not interfere with the rights of other parties. Here, however, the party who has broken the law, and has a judgment which is not "good, useful or available at law or in equity," asks us to allow him to take his warrants of attorney off the file in order to get them stamped, and so obtain a priority over another person who has not broken the law, but who has a good and valid judgment. It would be manifestly unjust so to deal with the records of the Court and the legal rights of the other party. He is entitled to say, "Why am I to be deprived of that which is at present my legal right? It is true another person has a judgment, but it is founded on a warrant of attorney that is not available. I, having obeyed the law, have a judgment that is perfectly free from objection, and you are asked to destroy its effect and give an advantage to a person who has broken the law." The judgments entered up on the unstamped warrants of attorney must be considered as having passed *per incuriam*; and we approve of an order which has been given, that in future no judgment shall be signed on an unstamped warrant of attorney. Therefore the application to take the warrants of attorney off the file for the purpose of being stamped must be re-

fused. The judgments must be set aside; after which the parties may take the warrants of attorney off the file, get them stamped, and then sign fresh judgment.

1859.  
  
 SEMPLE  
 v.  
 NICHOLSON.

MARTIN, B.—I am of the same opinion. It seems to me that this case comes within the very words of the 13 & 14 Vict. c. 97, s. 12. No doubt, cases are to be found in the books where warrants of attorney have been allowed to be taken off the file in order to be stamped; but in this case the party received distinct notice from the officer that it was improper to file these unstamped warrants of attorney, and he persisted in doing so. I should regret if the misfortune attendant upon it had fallen on a person who had not been warned; but here the party had, and therefore he cannot complain of the consequences. The 13 & 14 Vict. c. 97, s. 12, after having provided for the payment of a penalty for not stamping documents before execution, enacts “that no such deed or instrument shall be pleaded or given in evidence, or admitted to be good, useful or available in law or equity, until the same shall be duly stamped as aforesaid.” The application to us is to allow a judgment signed upon an unstamped warrant of attorney to be treated as “good, useful and available in law and equity.” If we were to allow it, the judgment would stand as a valid judgment against the rights of third persons. That seems to me an interference with rights which we ought not to sanction. We are bound by the act of parliament to protect third persons, which we should not be doing if we were to allow an act which would have a retrospective operation with respect to other judgments.

WATSON, B.—I am of the same opinion. The Stamp Acts on this subject are the 5 & 6 Vict. c. 82, the 8 & 9 Vict. c. 2, the 11 & 12 Vict. c. 9, and the 13 & 14 Vict.

1859.  
SEMPLE  
v.  
NICHOLSON.

c. 97, the latter of which repeals certain stamp duties and substitutes other rates. The consequence of allowing these unstamped warrants of attorney to be taken off the file for the purpose of being stamped would be to make them "good, useful and available in law and equity." But at the time they were filed they were not so; and the plaintiff is in the same situation as a person who has entered up judgment without any authority. It was objected that the subsequent judgment creditor, who had filed a warrant of attorney duly stamped, had no locus standi. That is not so, because, if he has an interest in defeating an invalid judgment, he has a right to apply to the Court for that purpose. The case of *Martin v. Martin* (a) is an express authority to that effect. There *Taunton, J.*, said: "I always doubted whether we could interfere at the instance of a third person, but I think in this case the Court may do so by virtue of their general jurisdiction over warrants of attorney, and because this is a fraudulent transaction." In this case a judgment creditor comes forward who has a properly stamped warrant of attorney, and though his judgment is subsequent to the others he has a right to insist on his interest in that judgment, and the Court ought not to allow the unstamped warrants of attorney to be taken off the file in order to defeat it. The plaintiff's attorney had filed many unstamped warrants of attorney, and was told by the officer that it was improper to do so; but he persisted in it, knowing that he was defrauding the revenue; and it would be a strong measure for us to decide that, on payment of the penalty of 10*l.*, he ought to be allowed to take the warrants of attorney off the file and get them stamped. It was said that it would be a hardship on the client, who is an innocent party, to suffer from the act of his attorney; but if he should sustain any loss he has his remedy by

(a) 3 B. & Adol. 934.

action. For these reasons I concur with the other members of the Court that the rule to take these warrants of attorney off the file for the purpose of getting them stamped should be refused.

1859.  
 SEMPLE  
 v.  
 NICHOLSON.

Application to take the warrants of attorney off the file for the purpose of being stamped refused; the other party to apply to a Judge at Chambers to set them aside.

ALLAWAY and Another v. WAGSTAFF.

Feb. 9.

THE declaration stated, that the defendant, at the time of the doing and occasioning the surface damage hereinafter mentioned, was entitled to a certain gale within certain enclosed lands of the Hundred of Saint Briavels, in the county of Gloucester, in and under the lands of the plaintiffs hereinafter next mentioned, and the plaintiffs were the owners of such enclosed lands; and certain surface damage was done and was occasioned to such enclosed lands of the plaintiffs by reason or means of the working of the said gale, and for which surface damage the plaintiffs, before the

The 68th section of the 1 & 2 Vict. c. 43, for regulating the working of mines in the Forest of Dean, provides that every free miner entitled to any gale within any inclosed lands, shall pay to the owner of such lands compensation for surface damage occa-

sioned by opening or working any gale *therein or thereon*, which compensation shall be determined by the gaveller or deputy gaveller; and if not paid within ten days after making an award by him, and a copy thereof served on the party required to pay the same, the amount may be recovered by action. The declaration in an action under that section, alleged that the deputy gaveller awarded that the amount of compensation for surface damage done to the inclosed lands of the plaintiffs, by the working of a gale therein or *thereon* by the defendant, was 60*l.* The plea set out the award, by which the deputy gaveller, after reciting that application had been made to him to determine the compensation for surface damage to lands *and buildings* of the plaintiffs, alleged to be inclosed lands, awarded that the amount of compensation for surface damage to the said lands *and buildings*, by reason of the working thereon and *thereunder* by the defendant, was 60*l.*; but whether the said lands and buildings were inclosed lands within the statute he made no award.

*Held*:—First, that the award was good, although the deputy gaveller had not found that the lands were inclosed.

Secondly.—That, assuming “surface damage” to mean damage on the surface, the award was not bad, because the deputy gaveller had found that the damage was occasioned by working *under* the lands, for by such working there might be damage on the surface.

Thirdly.—That as the word “lands” comprehends buildings, the declaration was good, although it appeared by the award that the compensation was in respect of the land and buildings.

1859.  
ALLAWAY  
v.  
WAGSTAFF.

making of the award hereinafter mentioned, were entitled to a full and fair compensation in money, pursuant to the statute made and passed, &c. (1 & 2 Vict. c. 43); and which compensation was to be ascertained and determined by the gaveller or deputy gaveller for the time being, pursuant to the said statute. That John Atkinson was the deputy gaveller for the time being of and for her Majesty's Forest of Dean, in the county of Gloucester, and duly authorized and empowered under and by virtue of the said statute to ascertain and determine the said compensation. That the said John Atkinson afterwards, to wit, on the 24th May, A.D. 1858, duly made his final award under his hand and seal, whereby, after reciting that on the 5th August, 1857, application had been made to him as H. M. deputy gaveller for the time being of and for her Majesty's Forest of Dean, in the county of Gloucester, by or on behalf of the plaintiffs, to ascertain and determine under and by virtue of the powers and authorities contained in and given to him, as such deputy gaveller as aforesaid for the time being, in and by the 68th section of the said statute, the full and fair amount of compensation in money for the said surface damage; and that he, the said deputy gaveller, did by a certain notice in writing under his hand address to the plaintiffs and James Wintle, their attorney, and also to the defendant, give notice that he would proceed to the hearing of the said parties respectively, by themselves and their respective counsel, attornies and witnesses, and evidence touching and concerning the matters and premises aforesaid; and that he would at the time and place aforesaid attend and proceed to and with the hearing of the said matters and premises; and that the said notice had been duly served upon the said parties respectively a reasonable time before the day appointed for the said hearing; and that he, the said John Atkinson, as such deputy gaveller, having attended at the time and place appointed for the

hearing of the said parties touching the matters and premises aforesaid, had been attended by the said parties or their agents respectively, and heard and saw all things which by the several parties or either of them it was desired he should hear or see, and inspected the said land and the said gale and the workings thereof: He, the said John Atkinson, ascertained, determined and awarded that the full and fair amount of compensation in money for the said surface damage so done and occasioned to the said enclosed lands of the plaintiffs by reason or means of the working of the said gale therein or thereon by the defendant, was the sum of sixty pounds sterling.—Averments: That a copy of the award was afterwards served upon the defendant, he being the party required to pay the amount of the said compensation: and ten days from the time of the making of the said award and from serving such copy as aforesaid had elapsed before the commencement of this suit: and that all things were done and had happened which it was necessary should have been done and should have happened to give validity to the award and to entitle the plaintiffs to maintain this action for compensation awarded as aforesaid.—Breach: Nonpayment.

Plea, setting out the award, which (so far as material) was as follows:—Whereas, on the 5th August, 1857, application was made to me, as her Majesty's deputy gaveller for the time being, of and for her Majesty's Forest of Dean, in the county of Gloucester, by or on behalf of a certain Company of Proprietors, called or known as the Cinderford Iron Company, at Cinderford, in the said county of Gloucester, to ascertain and determine, under and by virtue of the powers and authorities contained in and given to me, as such deputy gaveller for the time being, in and by the 68th section of a certain act of parliament made and passed &c. (1 & 2 Vict. c. 43), the full and fair amount of com-

1859.

ALLAWAY  
v.  
WAGSTAFF.

1859.

ALLAWAY  
v.  
WAGSTAFF.

compensation in money for certain surface damage which it was alleged by the said Company of Proprietors had been done or occasioned to certain lands, mill-house, and premises (that is to say), a certain parcel of land containing, by admeasurement, three perches, with a messuage or dwelling-house, called the mill-house, and two several out-buildings, erected and being upon the same land, all in the occupation of George Bright, as tenant thereof, and bounded, &c. (setting out the boundaries); all which said parcel of land, dwelling-house, and two several buildings are situate on a portion of the place called Ruspidge Common, within the said Hundred of Saint Briavels, in the said county of Gloucester, and by the said Company of Proprietors alleged to be inclosed land within the said Hundred of Saint Briavels, and of which they claimed to be the owners, by reason or means of the working of a certain gale, pit level, or work, at Cinderford aforesaid, and within the Forest and Hundred aforesaid, in the said county of Gloucester, called or known as the Cinderford Bridge Colliery, in and under the said premises, by one William Wagstaff, the owner of the said gale.—(The award then recited the notice, its service, and that the arbitrator had been attended by the parties, &c., as stated in the declaration.) Now I do determine, find, and award, touching and concerning the premises in manner following (that is to say): I find, determine, and award that surface damage hath been done, as alleged in the said application, to the said land and to the said mill-house and premises hereinbefore described, by reason or means of the working of the said gale, to wit, the said Cinderford Bridge Colliery, by the said William Wagstaff in and under the said land, mill-house, and premises. And I find, determine, and award that the full and fair amount of compensation in money for such surface damage so done and occasioned to the said land and mill-


house and premises by reason or means of the working of the said gale therein and thereunder by the said William Wagstaff, the owner thereof, is the sum of sixty pounds sterling; but whether the said land, mill-house, and premises are or are not inclosed lands of the said Hundred within the meaning of the statute 1 & 2 Vict. c. 43, I do not make or give any award, admission, or opinion whatever. In witness, &c.—And the defendant says that the said supposed award was and is wholly null and void.

Demurrer and joinder therein.

*Phipson* (*Pigott*, Serjt., with him), in support of the demurrer.—The question depends on the construction of the 68th section (a) of the 1 & 2 Vict. c. 43. Three objections are made to the award. First, that the 68th section applies only to inclosed lands within the Hundred, and the deputy gaveller has not found that the lands in question are inclosed. Secondly, that the damage to which

(a) Enacts:—"That every free miner or other person who is or may be entitled to any gale, pit, level, or work within any inclosed lands of the said Hundred shall and he is hereby required to pay to the owner of any such inclosed lands a full and fair compensation in money for any surface damage which may be done or occasioned to any of such inclosed lands by reason or means of the opening or working any gale, pit, level, or work therein or thereon, which compensation shall be ascertained and determined by the said Commissioners hereby appointed until the making of their final award; and after the said Commissioners shall have made their final award such compensation shall be ascer-

tained and determined by the gaveller or deputy gaveller for the time being; and if such compensation shall not be paid within ten days after the time limited for that purpose by the said Commissioners hereby appointed, or within ten days after the making of any such award by the gaveller or deputy gaveller, and a copy thereof served upon or left at the last known or usual place of abode of the party required to pay the same, then the amount of such compensation may be recovered in an action of debt by the person or persons entitled to receive the same in any of her Majesty's Courts of Record at Westminster, together with full costs," &c.

1859.  
  
 ALLAWAY  
 v.  
 WAGSTAFF.

1859.  
 ~~~~~  
 ALLAWAY  
 v.  
 WAGSTAFF.

the section extends is only surface damage occasioned by working *in* or *on* the lands, and does not extend to surface damage occasioned by working *under* the lands. Thirdly, the declaration is for damage to inclosed lands; the award is in respect of lands and buildings. As to the first objection: though the award does not shew that these are inclosed lands, the declaration states that they are; and, as that allegation is not traversed, it must be taken to be true. The award is in respect of the amount to be paid for compensation; the gaveller was not bound to state that the lands were inclosed. [*Bramwell*, B.—Even if the gaveller had decided against the plaintiffs, he would not have been bound by it. *Watson*, B.—All he had to do was to assess the damage. *Martin*, B.—The defendant should have traversed the allegation that the lands were inclosed.]—Secondly, the award is not bad, because it finds that surface damage has been done by reason of working *in* and *under* the land. The words of the Act ought not to be strictly construed. [*Martin*, B.—Have the free miners a right to work *under* inclosed land?] That right is not disputed. The preamble of the Act recites the claim of the free miners to open mines in all the lands within the Hundred. It appoints Commissioners: sect. 1; who are to ascertain what persons are in possession of or entitled to gales, and make rules for working the mines: sect. 24. The Commissioners are to set out to each gale definite metes and bounds: sect. 27; and make general rules specifying the mode in which gales shall be worked: sect. 29; and, after they have made their award, all customs respecting the mines are to cease: sect. 31. The 67th and 68th sections assume a right to work under inclosed land; but, if damage is done to the surface of the land, the miner must make compensation. [*Watson*, B.—Does not the term “surface damage” mean damage by

lowering the surface?] It includes, not only that, but all injury to the surface otherwise. There is every reason why the term "surface damage" should have the widest acceptation. The expression "working thereon" means anything and everything done on the surface; "working therein" must mean something different, and therefore can only apply to damage on the surface by working under.—Thirdly, the word "land" includes buildings.

1859.  
  
 ALLAWAY  
 v.  
 WAGSTAFF.

*Manisty*, contra.—The plaintiffs by their declaration claimed 60*l.* for damage to the *land*, but before the arbitrator they set up a claim in respect of damage to the *land and buildings*, and the arbitrator has awarded the 60*l.* for the damage to the land and buildings. [*Martin*, B.—The proper mode of raising that objection is by a traverse of the allegation in the declaration that the arbitrator awarded the 60*l.* for damage to the land.] The defendant has a right to have the award truly stated in the declaration, so that he may plead separately to the land and buildings. [*Martin*, B.—Buildings are included in the term land. In Co. Lit. 4 *a*, it is said:—"Land, terra, in legal signification comprehendeth any ground, soil, or earth whatsoever; as meadows, pastures, woods, moors, waters, marshes, furzes, and heath. \* \* \* It legally includeth also all castles, houses and other buildings; for castles, houses, &c., consist upon two things, viz., land or ground, as the foundation or structure thereof: so as passing the land or ground the structure or building thereupon passeth therewith." *Watson*, B.—The word "land" includes everything that would pass as land.] The expression "surface damage" in the 68th section means damage done to the surface by depositing soil or the like upon it, and not damage which may be caused to the surface by the necessary and proper working of the mine. The miner has a right to take all the minerals

1859.  
 ALLAWAY  
 v.  
 WAGSTAFF.

he can get, leaving sufficient support for the surface. It would be unreasonable for him to work in such a way as to let the surface down: *Harris v. Ryding* (a), *Humphries v. Brogden* (b), *Smart v. Morton* (c), *Rowbotham v. Wilson* (d). If the legislature had intended to provide for such a case different language would have been used. By the 64th section no gales can be granted in lands of the Crown inclosed for the growth of timber; but any person may work gales to which he is entitled under such lands, provided no damage is done to them.

MARTIN, B.—I am of opinion that the plaintiffs are entitled to judgment. I think that the declaration is good. Then, does the plea afford any answer to it? Unless the word “land” in the 68th section means “land only,” it is clear that it does not. The award is good on the face of it; and it is inconvenient to call on us to determine the matter when the real facts are not before us. The proper mode was to raise the question by a traverse, as I suggested in the course of the argument.

BRAMWELL, B.—I am of the same opinion. I think that the word “land” in the 68th section means, not only land, but the buildings upon it. It is true that the word “land” in the declaration may mean land only not with buildings upon it; but the plea sets out the award, which shews that the word “land” in the declaration means land and buildings. Then the next question is, whether the award gives compensation for surface damage to the land and buildings. It was argued that the term “surface damage” means only damage done upon the surface; but, whether that is so or not, the plea alleges a claim within it; for the award

(a) 5 M. & W. 60.  
 (b) 12 Q. B. 739.

(c) 5 E. & B. 30.  
 (d) 8 E. & B. 123.

shews that the damage was done by the working in and under the land, and it is possible that by so working damage may have been done upon the surface. I think that the declaration is good on the face of it; that the award is not bad on the face of it, and that the award is not inconsistent with the declaration.

1859.

ALLAWAY

v.  
WAGSTAFF.

WATSON, B.—I am of the same opinion. The 68th section says, that every free miner shall pay compensation for surface damage occasioned by working in or on inclosed lands; and, assuming Mr. *Manisty* right in his argument, it is clear to my mind that there may be an injury to houses, in the nature of surface damage, by working under the land. In mining leases there are often covenants for compensation payable de anno in annum in respect of injury to crops, and there may be damage to buildings from steam-engines, pit heaps, sand being thrown upon the land, and the like, which would come within the definition of surface damage. Then, inasmuch as the word “land” may comprehend buildings, we cannot say that it has not that meaning in the declaration.

Judgment for the plaintiffs.

ROBERTS v. SMITH.

Feb. 9.

DECLARATION for money payable by the defendant to the plaintiff for work done and salary due to the plain-

The plaintiff wrote to the defendant as follows:—“I agree to accept

the appointment of secretary of the Lancashire Cotton Mill Company upon the following terms, viz., first, a salary of 300*l.* per annum, commencing at the present date, if the Company be completely registered and put into operation; if not, I shall be satisfied with any remuneration for my time and labour you may think me deserving of and your means can afford.” The defendant wrote in answer accepting the terms, and adding,—“It is distinctly agreed and understood that if the Company is not formed and carried out, that part of your letter which alludes to your salary be null and void, and that at the expiration of three months it is entirely left to me to give unto you such sum of money as I may deem right as compensation for labour done in the event of the Company not being carried out.” The plaintiff rendered some service, but the Company was never formed.—*Held*, that there was no contract upon which the plaintiff could recover any part of the salary.

1859.  
ROBERTS  
v.  
SMITH.

tiff as secretary of the Lancashire Cotton Mill Company (Limited).


Pleas.—Never indebted and payment.

At the trial, before *Watson*, B., at the Middlesex Sittings in last Hilary Term, it appeared that the defendant was a promoter of a Joint Stock Company about to be formed, and that, in consequence of an advertisement for a secretary of the Company, the plaintiff went to Manchester and saw the defendant. After some negotiations, it was arranged that the plaintiff should be employed as secretary of the Company, and he wrote to the defendant the following letter :—

“ Manchester, October 17, 1857.

“ Dear Sir.—I agree to accept the appointment of secretary of the Lancashire Cotton Mill Company (Limited) upon the following terms, viz., first a salary of 300*l.* per annum, commencing at the present date, if the Company be completely registered and put into operation; if not, I shall be satisfied with any remuneration for my time and labour you may think me deserving of and your means can afford. Secondly, upon your furnishing me with the sum of 50*l.* on account of preliminary expenses, I will forthwith proceed to the formation of the Company and its establishment in London by provisionally registering it, taking suitable offices, furnishing them, advertizing and doing all necessary acts towards its formation; such sum of 50*l.*, it is understood, is to be expended solely for the purposes of the Company, and for the above object; if any further sum be required, it is to be left to your option according to the then state of the undertaking, whether you terminate the proceedings or make further advances; and, further, as a security for the 50*l.* lodged in my hands, or any further sum advanced me for the purpose of carrying out the Company, I will lodge with you promissory notes for the said

50*l.* or other sums, payable on demand, upon the understanding that such promissory note or notes shall not be presented for payment or the sums they represent demanded so long as the funds I have can be shewn to have been legitimately expended in the formation of such Company. If you agree to these terms, be good enough to inform me by letter, and I will at once proceed in the formation of the Company.—I am, &c.

1859.  
  
 ROBERTS  
 v.  
 SMITH.

“ R. W. Roberts.

“ Robert Smith, Esq.”

The defendant wrote as follows :—

“ Manchester, October, 17, 1857.

“ Dear Sir,—I beg to acknowledge receipt of your letter to me of this date accepting the secretaryship of the Lancashire Cotton Mill Company (Limited), the formation and carrying out of the said Company being placed in your hands on the terms contained in your letter to me. And it is distinctly agreed and understood, that if the Company is not formed and carried out, that part of your letter which alludes to your salary be null and void, and at the expiration of three months it is entirely left to me to give unto you such sum of money as I may deem right as compensation for labour done, in the event of the Company not being carried out, or making of any further advance for the continuing of the same. And I further agree not to part with or use any promissory note or notes you may lodge with me as secretary, for any sum or sums of money advanced by me to you for the purposes of working or forming the said Company, so long as I am satisfied such sum or sums of money be so expended.—I am, &c.

“ Robert Smith.”

“ Mr. R. W. Roberts.”

The plaintiff received the 50*l.* mentioned in his letter, and also a sum of 25*l.* He rendered some services in

1859.  
ROBERTS  
v.  
SMITH.

endeavouring to establish the Company, but it was never in a position to be completely registered, and the undertaking was ultimately abandoned. On the 23rd May, 1858, the plaintiff received a notice that his services were no longer required. This action was commenced on the 16th of November, 1858, and the plaintiff claimed 150*l*. for seven months salary after giving credit for the 25*l*. as received on account.

It was objected, on the part of the defendant, that there was no contract on which the plaintiff could recover. The learned Judge left it to the jury to say what was the value of the plaintiff's services, assuming that in point of law he was entitled to recover anything. The jury having estimated the service for the first three months at 75*l*. and for the subsequent four months at 80*l*., a verdict was entered for the plaintiff for 130*l*. (credit being given for the 25*l*.), and leave was reserved to the defendant to move to enter a nonsuit, or to reduce the damages, if the Court should be of opinion that there was any distinction in the periods for which the plaintiff was entitled to claim.

*Gray* having obtained a rule nisi accordingly,


*Gates* shewed cause.—The question is, whether the plaintiff is entitled to any remuneration for his services before or after the three months mentioned in the defendant's letter. The work having been done, the law will imply a promise to pay a reasonable amount for the service. [*Bramwell*, B.—The plaintiff must make out a contract to pay.] This case is distinguishable from *Taylor v. Brewer* (a), for there the party accepted the engagement on the express terms, "that any service to be rendered by him should be taken into consideration, and such remuneration be made as should be deemed right." *Bryant v. Flight* (b) is an

(a) 1 M. & Sel. 290.

(b) 5 M. & W. 114.

authority in favour of the defendant. There A. wrote to B. a letter as follows:—"I hereby agree to enter your service as a weekly manager commencing next Monday, and the amount of payment I am to receive I leave entirely for you to determine." A. served B. in that capacity for six weeks, and it was held by *Alderson, B., Gurney, B., and Maule, B.*, (*Parke, B.*, dissentiente), that the contract implied that A. was to be paid something at all events for the service performed, and that the jury, in an action on a quantum meruit, might ascertain what B., acting bonâ fide, would or ought to have awarded. [*Bramwell, B.*—The effect of the decision of the majority of the Court in that case is this, that the agreement as to the payment meant nothing, for if the defendant was bound to pay the plaintiff *something*, he was bound to pay him a reasonable amount, so that when a person says "I will be content with what you choose to give me," it is the same as saying "I will be content with a reasonable remuneration."] In *Bill v. The Darent Valley Railway Company* (a), it was held that it was no answer to an action by a secretary of a railway Company for his salary, that no determination as to such salary had ever been exercised at any general meeting of the Company. [*Bramwell, B.*—What I said in that case is somewhat differently reported in 1 H. & N. 305 and 26 Law J., Exch. 87. I meant to say, that the fixing the salary of the secretary at a general meeting of the Company was not a condition precedent to his right to recover it, and that the directors might allow him a reasonable amount; but if they paid him more than they ought to do, that would give the shareholders a right to complain.] The contract must be construed with reference to the defendant's letter, which in some respects differs from the plaintiff's letter, and shews that at all events the plaintiff was to be paid for

(a) 1 H. & N. 305.

1859.  
  
 ROBERTS  
 v.  
 SMITH.

1859.  
ROBERTS  
v.  
SMITH.

the first three months at the rate of 300*l.* a year. It is clear that the plaintiff expected some remuneration even if the Company was not formed.

*Gray* was not called on to support the rule.

MARTIN, B.—This is an action for compensation for labour, and there are two periods when the labour was performed, the one a period of three months, and the other subsequently. The question depends on the true construction of two letters, one from the plaintiff to the defendant, and the other the defendant's answer to it. The plaintiff writes thus:—"I agree to accept the appointment of secretary of the Lancashire Cotton Mill Company (Limited) upon the following terms; viz., first, a salary of 300*l.* per annum, commencing at the present date, if the Company be completely registered and put into operation; if not, I shall be satisfied with any remuneration for my time and labour you may think me deserving of and your means can afford." There is, therefore, a distinct offer by the plaintiff that he will enter into the service and perform the duties of secretary upon these terms, and that he will be satisfied with any remuneration which the defendants may think him deserving of and they can afford. It is true that there was an expectation by the plaintiff that he should receive some remuneration, but that was not a matter of right—he trusted to the honour of the defendants to pay him such a sum as they thought fit. In fact, the plaintiff put himself in this condition—"I will work for you, and I leave the remuneration in your hands." In reason and common sense that is a liability in honour, and not a liability by contract. It is said that there is some difference between that letter and the defendant's in answer: I think there is none. The answer is:—"And it is distinctly agreed and

understood, that if the Company is not formed and carried out that part of your letter which alludes to your salary be null and void, and that at the expiration of three months it is entirely left to me to give unto you such sum of money as I may deem right, as compensation for labour done, in the event of the Company not being carried out." It is impossible for any one to state more distinctly that the compensation to be paid to the plaintiff is to be left entirely in the discretion of the defendant. Two cases were cited, *Taylor v. Brewer* (a) and *Bryant v. Flight* (b); and, if I were called upon to say which was rightly decided, I should adopt *Taylor v. Brewer*. It is not necessary to express an opinion on the other case; but my impression is that the view of *Parke, B.*, is correct, and that of the other Judges is incorrect. It is said that there is a distinction between the first and second period of three months; but there is obviously none. If the plaintiff intended to alter the terms he should have called the attention of the defendant to it. The argument, that as a matter of law the plaintiff is entitled to be paid, is incorrect: it is by no means a matter of law that a person shall be paid for his services, it is a matter of contract. No doubt there is a variety of labour from which there arises an irresistible inference that the person who has done it is to be paid, but that is a sort of labour which is always done for money, and in such cases a jury would presume a contract on the ordinary terms, unless evidence was given to the contrary. But when a person says "I leave my remuneration in your hands," the contract is not on the ordinary terms. For these reasons I think that the rule ought to be absolute.

BRAMWELL, B.—I am of the same opinion. The plaintiff has to make out that the defendant is indebted to him.

(a) 1 M. &amp; Sel. 208.

(b) 6 M. &amp; W. 114.

1859.  
ROBERTS  
v.  
SMITH.

Generally speaking, a person is shewn to be indebted to another by proof of certain relations between them from which an inference arises that payment is to be made. If I hire a servant, I need not tell him I will pay him, for it is presumed that I will pay him. How, then, was the relation of master and servant, or employer and employed, established in this case? Two letters were put in:—(His Lordship read the material parts of them.) Therefore between these parties all implication is at an end, because we have the actual facts; and those are, that if the Company is formed the plaintiff is to have a fixed salary; if not, he is to be paid such sum as he may be thought deserving of and the means of the Company may afford. Now, what is the plain and literal meaning of that? It is this: if the Company is not formed the plaintiff is to be entitled to nothing as a matter of right, but he is to trust, not only to the honour of the defendant, but to the means of the Company. Then, do the authorities compel us to put a different construction on these letters? I think not. The only case on which the plaintiff can rely is *Bryant v. Flight*. It is not necessary to say whether I agree with the majority of the Court or with *Parke, B.*, for that case is manifestly distinguishable from the present. The plaintiff's letter is capable of this interpretation: "I agree to enter into your service and be your manager. You shall pay me a not unreasonable amount, and that amount I leave to you, instead of being at liberty to ask a jury whether it is reasonable. If you give it, I am content to take it." Here the plaintiff has stipulated that his remuneration shall be entirely in the hands of the defendant, and it is probable that he was content to do the work for a short time without payment, for the chance of ultimately becoming secretary at 300*L.* a year. The obvious construction of the letters is this, that if the Company is

not formed there is to be no claim, but the defendant may give something as a gratuity. Then, with respect to the point as to the three months, I think that the parties must be taken to have dealt on the same footing for the whole period, namely, that if the undertaking was not carried out the payment should be gratuitous. There is nothing in the plaintiff's letter as to the time which he would work, and the defendant's letter distinctly says that if the Company was not formed there was to be no salary.

WATSON, B.—I am of the same opinion. When it was arranged that the defendant should be secretary of the Company, each party wrote a letter, and these two letters constitute the contract. It is for us to construe that contract according to the fair meaning of the expressions in the documents. First, if the Company was registered, the plaintiff was to have 300*l.* a year, not from the time of registration, but from the time of the agreement, the 17th October. If the latter part of the first clause had not been put in, it would have been difficult to say whether the plaintiff was to be entitled to anything if the registration of the Company did not take place. But it is expressly provided that, if the Company is not formed, the plaintiff shall not have any claim which he can enforce in a Court of justice. The means of the Company might be small, the services might be small, or none, and so it was left to the defendant to say how much should be given, according to the funds of the Company. It is impossible for us to say that is a general engagement that the plaintiff shall be paid a reasonable sum. If we were to hold that a jury might assess the amount of compensation, it would be making a contract for the parties which they have not made for themselves. Then, as to the three months, the expressions are rather obscure; but I suppose the meaning was

1859.

ROBERTS

v.

SMITH.

1859.  
 ROBERTS  
 v.  
 SMITH.

that the Company should be registered at the end of three months. Still, if it was not registered until July, 1858, the plaintiff would be entitled to his salary from the 15th October, 1857. If no registration took place, the plaintiff was to be paid what the defendant should think right and proper and the funds of the Company would permit. There is nothing extraordinary in such an agreement. The plaintiff, in one event, would obtain a permanent situation with 300*l.* a year, and it is not unreasonable that he should take for his services for the three months such remuneration as the defendant should think fit to give him.

Rule absolute.

Feb. 8.

MANT v. SMITH and Others.

In an action on an attorney's bill against three defendants, who were promoters of a Joint Stock Company, it appeared that the plaintiff sent to one of them in a letter a bill, headed "To the promoters of the L. Company."—*Held* a sufficient delivery of the bill within the 6 & 7 Vict. c. 73, s. 37.

**T**HIS was an action on an attorney's bill against Robert Smith, Richard Smith, and Joshua Lord.

Pleas by Richard Smith and Joshua Lord.—First, Never indebted —Secondly, that the plaintiff did not, one calendar month before the commencement of the suit, deliver unto the said defendants or either of them, they being the parties to be charged therewith, or send by the post, &c., a bill of the fees, charges, &c., subscribed with the proper hand of the plaintiff, &c., as required by the statute.

Replication.—That the plaintiff did, one calendar month before the commencement of the suit, send in his bill, &c., subscribed with his hand, as required by the statute.

Pleas by Robert Smith.—Never indebted.—Payment.

At the trial, before *Bramwell*, B., at the Middlesex Sitings in Hilary Term, it was proved that the plaintiff, a solicitor, sued the defendants, who were promoters of "The Lancashire Cotton Mill Company, Limited," in respect of

work done in relation to the getting up of the Company ; and, in order to sustain the issue on the replication that a signed bill was delivered, the plaintiff proved that he sent to Robert Smith a bill headed "The Promoters of the Lancashire Cotton Mill Company, Limited, to George French Mant. Dr." This bill was inclosed in a letter, of which the following is a copy :—

1859.

MANT  
v.  
SMITH.

" Bedford Row.

" Dear Sir,—I enclose my bill, as requested, against the promoters of the Lancashire Cotton Mill Company, Limited, and I shall be glad to receive a check for the amount, &c.

" Robert Smith, Esq.,

" Yours truly,

" Bacup."

" G. F. Mant."

Robert Smith had taken the active part in the management of the Company, and there was evidence that the bill had come to the knowledge of all the defendants a month before the action. The jury found a verdict for the plaintiffs against all the defendants, leave being reserved to move to enter a verdict for them.

*Gray*, in Hilary Term, had obtained a rule to enter a verdict for the defendants, on the ground that there was no sufficient delivery of a signed bill of costs (a).

*Gates* now shewed cause.—If all the defendants are jointly liable, the sending a bill to one is sufficient. Now, though the defendants may not be jointly liable as promoters simply, the words used are a sufficient intimation to the three that the plaintiff intended to charge all of them. In an action on an attorney's bill against one of the managing committee of the Northampton, Lincoln, and Hull Railway Company, a bill, headed "Northampton, Lincoln, and Hull Railway," was held to be sufficient:

(a) It also objected that there was no evidence of a joint liability.

1859.

*MANT*  
v.  
*SMITH.*

*Daubney v. Phipps (a)*. [*Watson*, B.—In *Tidd's Practice*, p. 334, it is laid down that, if two persons are liable on a joint retainer, it is sufficient if the bill is delivered to the one who had the management of the business.]

*Gray*, in support of the rule.—The bill of costs was not properly headed, so as to designate the party to be charged therewith. The promoters are not a recognised body, but only persons who are willing to form a Company. [*Martin*, B.—The 6 & 7 Vict. c. 73, s. 37, does not require that the name of the party should be at the head of the bill.] There must, nevertheless be a delivery in such a way as to indicate to the party that he is sought to be charged: *Gridley v. Austen (b)*. Here the bill was sent to Robert Smith; and *Edwards v. Lawless (c)* is an authority that such a delivery is not sufficient to charge the other defendants.

MARTIN, B.—If the three defendants are jointly liable, *Daubney v. Phipps (a)* is a conclusive authority that there has been a sufficient delivery of the bill. The question of joint liability should be referred to the Master.

BRAMWELL, B.—I am also of opinion that there has been a sufficient delivery of the bill. It is as if the bill had been headed to the three defendants and delivered to one of them.

WATSON, B.—I am of the same opinion. In the case of co-contractors, the delivery of a bill to one of them is a delivery to all. Then, assuming the defendants are jointly liable, there is a bill sent to one of them who had authority to contract for the others. All that the statute requires is,

(a) 16 Q. B. 504. Affirmed in error, *Ib.* 514.

(b) 16 Q. B. 504.  
(c) 6 C. B. 329.

that the bill should indicate the party to be charged. Here the bill is headed "To the promoters of the Company;" and that sufficiently indicates that the defendants are the parties to be charged.

1859.

MANT  
v.  
SMITH.

Rule accordingly.

## IN THE EXCHEQUER CHAMBER.

(*Appeal from the Court of Exchequer.*)

M'MANUS v. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY. Feb. 16.

THIS was an appeal from the Court of Exchequer making absolute a rule to enter a verdict for the defendants (reported, 2 H. & N. 693).

The 17 & 18  
Vict. c. 31, s. 7,  
which makes  
void all notices,  
conditions and  
declarations,  
made and  
given by a  
railway or ca-  
nal Company,  
limiting their  
liability, unless


*Blackburn* (with whom was *Brett*), argued for the appellant (a).—The propositions for which the plaintiff contends

such as the Court or the judge trying the cause may adjudge to be just and reasonable, extends to cases where a special contract has been signed in conformity with the subsequent provision in the statute. So *Held* in the Court of Exchequer Chamber, reversing the judgment of the Court of Exchequer. Dissentiente *Erle, J.*

The plaintiff brought three horses to the cattle station of the defendants' railway at Liverpool, to be forwarded by a cattle truck to York. The defendants' servant provided a truck for the purpose, which to all external appearance, and so far as the servant knew, was sufficient for the purpose. The plaintiff signed a ticket which contained the following memorandum. "This ticket is issued subject to the owners undertaking all risks of conveyance, loading and unloading whatsoever; as the Company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling upon the railway or in their vehicles." Two pence per mile was charged for horses laden at the cattle station. Horses so laden are forwarded in open trucks by a cattle or luggage train. At the passenger station horses are taken at the rate of four pence a horse per mile. Horses laden at this station are forwarded in horse boxes by the trains departing from the passenger station, usually passenger trains. The tickets issued by the Company for horses forwarded by the passenger trains is similar to that signed by the plaintiff. The truck proved to be insufficient for the carriage of the horses, and a hole was made in it on the journey, by which the horses were injured.—*Held*, by the Court of Exchequer Chamber, reversing the judgment of the Court of Exchequer: first, that the condition that the Company "would not be responsible for any injury or damage, howsoever caused," was not just and reasonable, and therefore void. Secondly, that it did not protect the defendants from liability in respect of the defect in the truck. Dissentiente *Erle, J.*

*Per Erle, J.*, that the condition did not extend to wilful neglect or other misfeasance.

(a) In last Michaelmas Vacation (Dec. 1) before *Erle, J.*, *Williams, J.*, *Crowder, J.*, *Crompton, J.*, and *Willes, J.*

1859.  
  
 M'MANUS  
 v.  
 LANCASHIRE  
 AND  
 YORKSHIRE  
 RAILWAY CO.

are that the contract with the defendants, though signed by the plaintiff, was a carrier's contract, subjecting the defendants to the liability of carriers, except so far as that liability is qualified by valid conditions: that the 17 & 18 Vict. c. 31, s. 7, in effect provides that conditions, limiting the liability of the companies therein mentioned, shall be void unless just and reasonable: and, that the conditions contained in the ticket in the present case are not just and reasonable. In construing a remedial statute it is convenient to consider the state of the law before the Act passed, to see "what was the mischief," and "what remedy parliament had appointed:" *Heydon's Case* (a). Now, at common law, carriers were subject to the liability of insurers in respect of goods delivered to them to be carried. In order to restrict such liability they endeavoured to protect themselves by notices. Litigation having arisen as to the effect of such notices, the Carriers' Act, 1 Wm. 4, c. 68, s. 4, provided that *public notices* should not be deemed to limit their responsibility. The Act does not affect special contracts: sect. 6. The liability of an ordinary carrier may be limited by a notice given by him to the person who delivers goods to him, but only on the ground that it is evidence of a contract: *Wyld v. Pickford* (b). And, except so far as the liability is limited by the notice, the ordinary liability of a carrier remains. The old reason for the extensive liability of a carrier was, that, having taken possession of a line of country, he had practically a monopoly. When railways were established the old reason revived. Railway companies succeeded in compelling persons who used their lines to enter into contracts limiting their liability even for their gross negligence. In *Shaw v. The York and North Midland Railway Company* (c), decided in 1849, where the ticket was similar to that in the present case,

(a) 3 Rep. 7 b.

(b) 8 M. & W. 443.

(c) 13 Q. B. 347.

the Court doubted whether, notwithstanding the notice, the plaintiff might not have charged the defendants with the damage arising from a breach of the duty to provide a proper carriage. The next case was *Austin v. The Manchester, Sheffield and Lincolnshire Railway Company* (a). In *Chippendale v. The Lancashire and Yorkshire Railway Company* (b), decided in November, 1851, the County Court judge left it to the jury to say whether the carriage was voyage-worthy. The Court, however, on appeal, held that the ticket was sufficient to protect the Company from liability for not providing a proper carriage. In the case of *Austin v. The Manchester, Sheffield and Lincolnshire Railway Company* (c), decided in May, 1852, there was a special declaration for injury to horses delivered to the defendants to be carried, charging gross negligence on the part of the Company's servants in not greasing a wheel which had become heated by friction, of which the defendants had notice, and were requested by the plaintiff to make proper provision against the friction, or to remove the horses to another carriage, which they refused to do. The declaration set out the ticket, which stated that it was issued "subject to the owner's undertaking to bear all the risk of injury by conveyance or other contingencies." On motion in arrest of judgment, the Court held that the bargain was, that the Company were not to be held responsible for any risk of whatever kind or however arising in the course of the journey. That case was followed in *Carr v. The Lancashire and Yorkshire Railway* (d). *Purke*, B., there said: "If any inconvenience should arise from these contracts being entered into, that is not a matter for our interference; but it must be left to the legislature, who may, if they please, put a stop to this mode which the carriers have adopted

1859.


M·MANUS  
v.  
LANCASHIRE  
AND  
YORKSHIRE  
RAILWAY CO.

(a) 16 Q. B. 600.

(b) 21 L. J., Q. B. 22.

(c) 10 C. B. 454.

(d) 7 Exch. 707.

1859.  
  
**M·MANUS**  
 v.  
**LANCASHIRE**  
**AND**  
**YORKSHIRE**  
**RAILWAY CO.**

of limiting their liability." The legislature answered that appeal to them by passing the Act now in question. Those cases established that the ticket protected the railway company from the consequences of their own negligence or misconduct. *The Great Northern Railway Company*, app., *Morville*, resp. (a), *The York, Newcastle and Berwick Railway Company*, app., *Crisp*, resp. (b), *Hughes v. The Great Western Railway Company* (c), *Slim v. The Great Northern Railway Company* (d) are cases where the Companies were held to be protected under similar circumstances. In *Walker v. The York and North Midland Railway Company* (e) it was held that, the terms of the notice limiting the liability of the Company having been brought to the notice of the plaintiff, who was sending fish to London, constituted a special contract with him in spite of himself. These cases shew that railway companies had a virtual monopoly, and that though they ought therefore to have carried on reasonable terms they would not do so. The 17 & 18 Vict. c. 31, s. 7, was passed to remedy this grievance. The enactment is that such companies "shall be liable for the loss of or for injury done to any horses, cattle or other animals, or to any articles, goods or things, in the receiving, forwarding or delivery thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition or declaration made or given by such company contrary thereto, or in anywise limiting its liability; every such notice, condition or declaration being hereby declared to be null and void: Provided always that nothing herein contained shall be construed to prevent the companies from making such conditions with respect to the receiving, forwarding and delivering any of

(a) 21 L. J. Q. B. 319.

(b) 14 C. B. 527.


(c) 14 C. B. 637.


(d) 14 C. B. 647.

(e) 2 E. & B. 750.

the said animals, articles, goods, or things as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried, to be just and reasonable." If it is contended that the words "notwithstanding any notice, condition or declaration" apply only to public notices, the legislature must have misapprehended the law, because conditions, not part of the contract, never could have had any operation. The statute goes on to provide that "no special contract" shall be binding unless signed. To construe this as permitting any special contract to be valid, if signed, is to treat the enactment and the proviso as repugnant. The construction contended for, though it interferes with the agreement between the parties, is in analogy to the 1 & 2 Wm. 4, c. 22, s. 43, which provides that agreements with hackney coachmen to pay more than the legal fare shall not be binding. The condition in the present case is not just or reasonable. The Company are not to be responsible *for any injury or damage, howsoever caused*. That would exempt them from the consequences of the actual misconduct of themselves or their servants. In *Simons v. The Great Western Railway Company* (a) the Court of Common Pleas held that a condition "that in the case of goods conveyed at special or mileage rates, the Company would not be responsible for any loss or damage, however caused," was reasonable. But that decision amounts to no more than this, that a company may say, "If you pay the ordinary rate, we are responsible; but, if you pay only the special mileage rate, you must undertake all risk:" and there is nothing unreasonable in that. Here, however, the plaintiff had no choice. In the same case the Court held that a condition that the Company would not be responsible for the loss, detention, or damage of any package insufficiently or im-

(a) 18 C. B. 805.

1859.  
  
 M'MANUS  
 v.  
 LANCASHIRE  
 AND  
 YORKSHIRE  
 RAILWAY Co.

1859.  
  
 M·MANUS  
 v.  
 LANCASHIRE  
 AND  
 YORKSHIRE  
 RAILWAY CO.

properly packed was unreasonable. *Jervis, C. J.*, in delivering the judgment of the Court, adopts the view now contended for. In *Wise v. The Great Western Railway* (a) the Court assume that the plaintiff's neglect was the cause of the injury to the horse. In *Peck v. The North Staffordshire Railway Company* (b) the Court of Queen's Bench held that a condition, though reasonable and assented to by the person delivering the goods, was not binding on him, because it was not part of a written contract signed by him. But it has been said that a railway company carrying horses is not liable as a carrier. Horses are not a new subject of carriage. From time immemorial they have been carried in ferry-boats and imported in ships. The liability of the carrier of live animals is the ordinary liability of a carrier: *Palmer v. The Grand Junction Railway Company* (c). There is a distinction as to passengers, because they cannot be controlled. [*Unthank*.—The Act applies to animals; and it is not contended that the Company is not responsible for an injury to animals in the same way as for an injury to goods.] The Company furnished a carriage which was not voyage-worthy; that was a default prior to the peril of the transit. The notice does not protect the Company from furnishing a proper carriage. A carrier by land is as much bound to furnish a voyage-worthy carriage as a carrier by sea is to provide a seaworthy ship: *Story on Bailments*, 562, *Sharp v. Grey* (d), *Worms v. Story* (e). In *Phillips v. Clark* (f) it was held that a stipulation in a bill of lading that the ship-owner was not to be accountable for leakage or breakage did not exempt him from responsibility for a loss by those means arising from *gross negligence*. The case of *Chippendale v.*

(a) 1 H. & N. 63.

(b) 27 L. J. Q. B. 465.

(c) 4 M. & W. 749.

(d) 9 Bing. 457.

(e) 11 Exch. 427.

(f) 2 C. B., N. S. 156.

*The Lancashire and Yorkshire Railway Company* (a) is not consistent with the principle of that case.

1859.

*M·MANUS*  
v.  
LANCASHIRE  
AND  
YORKSHIRE  
RAILWAY CO.

*Unthank*, for the respondent.—As to the construction of the 17 & 18 Vict. c. 31, the cases shew that, before the Act passed, there were two courses commonly pursued by railway Companies desirous of limiting their liability as carriers with respect to persons delivering goods to them to be carried. One well known practice was to require the parties to sign a written agreement which contained the contract between the parties, of which *Austin v. The Manchester, Sheffield and Lincolnshire Railway Company* (b) was an instance. The other, to serve notices, and to require all dealings to be on the terms of such notices, of which *Walker v. The York and North Midland Railway Company* (c) was an instance. It was said to be law that a railway Company had the power of binding parties dealing with them, against their consent. That was the mischief which the legislature intended to remedy by the 7th section of the 17 & 18 Vict. c. 31. The language is, “notwithstanding any notice, condition or declaration made or given by such Company.” The first part of the section says nothing about agreements *between the parties*. In distinguishing between notices and special contracts the Railway and Canal Traffic Act follows the Carriers Act, 1 Wm. 4, c. 68. The section only prevents Companies from stipulating by notices against the neglect or default of the Company or their servants. It leaves them free to protect themselves by notices against liability for accidental fire, or robbery by violence. The object is to compel them to carry on reasonable terms; if they refuse to carry on reasonable terms they are liable to an action. The

(a) 21 L. J. Q. B. 22.

(b) 10 C. B. 454.

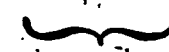
(c) 2 E. &amp; B. 750.

1859.

**M'MANUS**  
v.  
**LANCASHIRE**  
**AND**  
**YORKSHIRE**  
**RAILWAY CO.**

second clause of the section is more extensive than the first, not merely a limitation of it. It allows Companies to make reasonable conditions. Then, in the next proviso, the legislature says we have in view not only notices, as in the first branch of the clause, but also agreements: *agreements shall be in writing and signed*. The words of an Act must be very clear to deprive parties of their common law rights to make their own bargains. [*Crompton, J.*—Does not the word “condition,” in the former part of the section, apply to contracts?] It must be read in conjunction with and as qualified by the words which precede and follow it, “notice” and “declaration.” [*Crompton, J.*—A condition cannot operate unless it is assented to by both parties.] Secondly, the condition is reasonable. The nature of the thing to be carried must always be taken into consideration in determining the question of the reasonableness of conditions. A horse is a powerful animal, very timorous and with a strong will: any sudden noise is likely to excite its fears or its anger; therefore conditions unreasonable with respect to goods may be reasonable with respect to a horse. A railway Company has no means of knowing the temper or constitution of a horse. [*Crompton, J.*—Therefore it may be reasonable to provide that, if an accident should occur on account of the horse’s temper, the owner of the horse should bear the loss.] Suppose the railway Company take all risks, they must charge higher fares. It is not unreasonable for them to say, “We will charge lower fares, but will not be insurers.” With respect to the carriage of cattle or horses, it is impossible to provide against certain things which may be called negligence. It is necessary for Companies to take some precautions, by terms in their contracts, to protect themselves against such risk, and the only way in which they can do so is in general terms. It is not unreasonable to say that they will not be liable in

respect of live stock except for wilful injury. The observations of *Parke, B.*, in *Carr v. The Lancashire and Yorkshire Railway Company* (a) shew that this very contract is reasonable.

1859.  
  
*M. MANUS*  
 v.  
 LANCASHIRE  
 AND  
 YORKSHIRE  
 RAILWAY CO.

*Blackburn* replied.

The Court being divided in opinion, the following judgments were delivered.

**ERLE, J.**—In this case two questions are raised:—First, Whether the railway Company can enforce a special contract signed by the plaintiff for the carriage of horses, if the Judge does not think the conditions therein to be just and reasonable; and, secondly, Whether the conditions in this contract are just and reasonable.

The plaintiff contends that each question should be answered in the negative.

With respect to the first, he relies on the construction of the 17 & 18 Vict. c. 31, s. 7, given in *Simons v. Great Western Railway Company* (b), and adopted by the Court of Queen's Bench in *Peck v. North Staffordshire Railway Company* (c), deciding "that the whole railway system is placed under the control of the Judges, so that no contract signed by the customer, respecting liability for carriage, shall protect the Company, unless the Judge shall think every condition therein just, &c.; and no just condition, respecting liability for carriage, shall protect the Company, unless it be contained in a contract signed by the customer."

The defendants rely on the construction given by the Exchequer in *Wise v. Great Western Railway Company* (d) and *Pardington v. The South Wales Railway Company* (e),

(a) 7 Exch. 707.

(c) 27 L. J., Q. B. 465.

(b) 18 C. B. 805. 829.

(d) 1 H. & N. 63.

(e) 1 H. & N. 392.

1859.

**M'MANUS**  
 v.  
**LANCASHIRE**  
**AND**  
**YORKSHIRE**  
**RAILWAY CO.**

deciding that the clause in the statute relating to conditions does not extend to special contracts.

In my opinion, the defendants are right ; and in support of that opinion I propose to distinguish the duties of carriers arising by mutual consent of carrier and customer, expressed in contracts defining the work to be done, the terms, and the responsibility ; from the duties of carriers arising by law from the profession of carrier and from a bailment to carry. These latter are duties which may attach where there is no express contract, or be superinduced beyond the terms of any contract, and as they do not originate without the will of the person making the profession or taking the bailment, so by that will, without the will of the customer, they may be qualified and regulated in many respects.

Examples of liabilities on contracts are superfluous. But for examples of duties created by law, without a contract, or beyond a contract, and regulated by will, I would cite the following:—If a person chooses to profess to be a common carrier, the law creates a duty to receive things brought for carriage, and he may be liable *ex delicto* for a refusal to receive : *Pickford v. Grand Junction Railway Company* (a). But this duty is regulated according to his will in many respects. He may choose the kind of conveyance, the times for transit, the mode of delivery, the articles that he will profess to carry, what price he will have, when he shall be paid ; and the duty to receive is always limited by his convenience to carry : see *Jackson v. Rogers* (b), *Johnson v. North Midland Railway Company* (c). This right to qualify the duty of receiving, according to terms and conditions fixed by the carrier alone, comprises the right to qualify the common law duty of insuring safety, a duty

(a) 8 M. &amp; W. 372.

(b) 2 Show, 327.

(c) 4 Exch. 867.

which has given rise to much discussion, and is now for our consideration.

Where the *contract* is not only for carriage and delivery, but also for safe delivery, either absolutely or in degree, the contractor may sue the carrier for breach of contract in common course. But we are dealing with the duty of safe delivery imposed upon the carrier, either where the law of contract does not apply, as in case of consignees of goods sent, who were no parties to the contract for carriage, or where there was no mutual consent between the customer and the carrier upon the point.

In all cases where he has accepted the goods generally the duty of the carrier to insure safe delivery, excepting only the act of God, or of enemies, is clear; but this duty is attached to him on the assumption that he has had the opportunity of securing to himself remuneration adequate to the risk so cast upon him. If he has not had that opportunity, or if the circumstances make the protection reasonable, he may, by a special acceptance, either limit his responsibility upon conditions, or be clear of it altogether.

Lord *Hale's* authority is to this effect, saying, "if a carrier will, he may make a caution for himself, which if he omits, and takes in goods generally, he shall answer for what happens:" *Morse v. Slue* (a). The carriers' notices rejecting responsibility, unless the conditions of insurance be complied with, are special acceptances imposing a limit to liability by the will of the carrier, against the will of the customer.


Lord *Mansfield* and his Court so treat this right: see *Gibbons v. Paynton* (b). Lord *Ellenborough* and his Court so treat it, and he says that the legal right of the carrier thus to protect himself had rendered legislative interference

(a) 1 Vent. 238.

(b) 4 Burr. 2298.

1859.

M'MANUS  
v.  
LANCASHIRE  
AND  
YORKSHIRE  
RAILWAY Co.

1859.  
  
 M'MANUS  
 v.  
 LANCASHIRE  
 AND  
 YORKSHIRE  
 RAILWAY CO.

for his protection needless: *Nicholson v. Willan* (a). Lord *Tenterden* and his Court so treat it. Where the customer knew of the notice to insure and the carrier knew the value of the article, and the first did not offer, and the other did not ask for, the premium, the carrier was protected by his notice; and the Court says, "a person may engage to place goods in a course of conveyance and delivery, and yet declare that he will not be answerable for their loss:" *Marsh v. Horne* (b). Other cases on carriers' notices are to the same effect, and although these conditions are called at times special contracts as well as special acceptances, it is clear, from the context, that a right in the carrier to guard himself against the party attempting to overreach by imposing risk without paying premium, is always meant, which is not a contract in its true sense.

After the time of these cases, this protection from notices became practically lost to the carrier, by imputing the damage or loss to gross negligence; the damage or loss being some evidence of negligence, and the line between negligence and gross negligence being undefined, as observed by Lord *Denman* in *Hinton v. Dibbin* (c). The judgment of *Garrow*, B., declaring what was sufficient evidence of gross negligence, tended to this result: see *Bodenham v. Bennett* (d); and this tendency was increased by the judgment of *Burrough*, J., lamenting that the doctrine of notice had ever been introduced into Westminster Hall: *Smith v. Horne* (e). And in deference to these cases the ruling of Lord *Tenterden*, giving effect to a carrier's notice, was set aside and a new trial granted in *Birket v. Willan* (f).

Thereupon the legislature interposed, and granted to the

(a) 5 East, 507.

(b) 5 B. & C. 322. 326.

(c) 2 Q. B. 646. 662.

(d) 4 Price, 31.

(e) 8 Taunt. 144.

(f) 2 B. & Ald. 356.


land carriers, by 11 Geo. 4 & 1 Wm. 4, c. 68, fair protection in respect of the specified articles, unless the customer insured. It granted a new right in respect of these articles; in all other respects, it left the existing rights of a carrier to limit his liability, either by a special acceptance, or a special contract, unaltered, and although all effect is taken away from public notices and declarations, that did not affect the right of the carrier in respect of personal notices: see *Walker v. York and North Midland Railway Company* (a). The carrier's duty to receive, and his right to reject, in some cases absolutely, in others conditionally, without regard to the will of the customer, and therefore without special contract, remained as before. And although, before the 17 & 18 Vict. c. 31, it was immaterial whether the carrier was said to limit his responsibility by special acceptance or by special contract, yet as that statute, in my view, has subjected the validity of conditions imposed by special acceptance to the contingency of being thought just &c., and of conditions imposed by a special contract to that of being signed, the distinction, which has now become very material, was, in the cases occurring in the interim between the two statutes, scarcely worth regard.

These cases are much relied on for the plaintiff, and although, in the Court below, I may be bound by the reasons for the decisions of a co-ordinate Court; in a superior Court, I hope I may, without impropriety, or want of due deference, speak of them as I think.

In *Wyld v. Pickford* (b) the point arose. The plaintiff brought case for loss of maps by a carrier: the plea was that the defendants gave notice to the plaintiff, at the time of the delivery of the maps, that they would not be responsible for them unless insured, and that they accepted the maps on those terms, and that the maps were not insured. The

(a) 2 E. &amp; B. 750.

(b) 8 M. &amp; W. 443.

1859.  
  
 M'MANUS  
 v.  
 LANCASHIRE  
 AND  
 YORKSHIRE  
 RAILWAY Co.

1859.  
M'MANUS  
v.  
LANCASHIRE  
AND  
YORKSHIRE  
RAILWAY CO.

plaintiff demurred to the plea, and argued that, as there was no fraud, the carrier could only limit his liability by special contract; and that the plea shewed no consent of the plaintiff, and therefore no contract. The defendants argued, that a carrier could limit, by special acceptance, simpliciter, without the consent of the customer, and cited many clear authorities to prove it. The judgment was, that the plea pleading a special acceptance only, and not a special contract, was still good. The ground of the judgment is remarkable; it assumes that a carrier can only limit his responsibility by special contract, and as a special acceptance on the terms of a notice does limit his liability, it must be imagined that the customer agreed with the carriers to forego his right to the common law responsibility of carriers, in consideration of the carriers foregoing their right to prepayment of the carriage by the customer.

The judgment on this point concludes thus: "It is objected that there is no express averment that the plaintiff consented to those terms, but assuming that he did not, the defendants did not accept the maps on any other, and the plaintiff is in this difficulty, that he cannot enforce the defendants' obligation as common carriers, because he was not ready to pay the price of carriage beforehand; and, if he sue as on a bailment to the defendants on special terms, it must be a bailment on those terms on which alone they have agreed to accept the goods."

With great deference, I beg to submit that this judgment, in some degree, recognises the right of the carrier to stipulate without the consent of the customer, and, at all events, it does not establish that the carrier has no right to protect himself, if the customer refuses consent. Moreover, as the Judges, from Lord *Hale* to Lord *Tenterden*, had spoken of the right of the carrier to protect himself from the extreme obligations of the common law by special


acceptance, and as that right would be nugatory if it depended on the customer's consent, and as there is no trace of the notion of a contract in consideration of being let off prepayment till this case, I further submit that a judgment upon the ground of special acceptance, simpliciter, as the defendants' pleader pleaded, and their counsel argued, would have better accorded with the tenor of preceding authorities.


In *Walker v. York and North Midland Railway Company* (a) the carrier limited his responsibility by special acceptance. The judgment was that he was protected; and, though the judgment placed the protection on the ground of a special contract being presumed, the contract implied by the Court was rather a fiction of law, for the purpose of doing right to the carrier without clashing with the last case, than a matter of fact.

The plaintiff complained of delay in delivering fish; the defendants shewed a notice, served on plaintiff, that they carried fish, at a low rate, on the terms of no liability for delay, and that they accepted the goods on these terms. The plaintiff, so far from agreeing to the terms of the notice, claimed to treat it as null and void; the Judge ruled that if the carrier gives a notice, and the customer dissents from the notice, and the carrier does not acquiesce in the dissent, the sending of goods by the customer is ground from which a jury may infer the customer's assent to a special contract in the terms of the notice, and so the verdict was for the defendants, and the Court, in upholding it, does really affirm that a special acceptance of the carrier may bind the customer, but in the circuitous mode that the jury may infer a contract by the customer contrary to his expressed intention.

The cases relating to animals are not to the point, as

(a) 2 E. & B. 750.

1859.  
  
 M·MANUS  
 v.  
 LANCASHIRE  
 AND  
 YORKSHIRE  
 RAILWAY Co.

1859.  
  
 M. MANUS  
 v.  
 LANCASHIRE  
 AND  
 YORKSHIRE  
 RAILWAY CO.

they were special contracts as well as special acceptances:  
*Austin v. Manchester, Sheffield and Lincolnshire Railway Company (a)*, *Carr v. Lancashire and Yorkshire Railway Company (b)*.

Then the 17 & 18 Vict. c. 31, passed, regulating carriage by canals and railways.

I submit that, when it passed, the law was that a carrier had some power of imposing conditions on his common law liability, by special acceptance, without the assent of the customer to those conditions; and that the carrier had, besides, the same free capacity to make any lawful contracts as other subjects possess.

Construing the statutes with reference to this state of the law, the defendants' construction gives full effect to every word in its ordinary meaning; it also accords with the context, and the enactment so construed has an intelligible policy.

The plaintiff's construction cannot be true, unless the greater part of the words are of no effect, nor unless the context is violently transposed, nor unless the legislature intended, what seems to me to be iniquitous, against this class of carriers.

According to the defendants, the carrier's right to refuse a general acceptance, and to impose conditions by notices, declarations and other special acceptances, was, in some degree, in conflict with the supposed duty to receive whatever he could conveniently carry, and the law had not defined the line when the customer could sue the carrier for loss, if he had refused any but a qualified acceptance, and so imposed unreasonable conditions.

Then the statute declares "no notice, condition or declaration" shall restrict his liability unless the condition shall be thought just and reasonable by the Judge.

(a) 10 C. R. 454.

(b) 7 Exch. 707.


Notices and declarations, without the consent of the customer, can only operate by imposing conditions: the statute recognizes that they may still so operate if the conditions are thought just, &c. by the Judge; and on this view full effect is given to the clause relating to conditions.


Then, after several clauses on other matters, comes the proviso relative to contracts: "No special contract shall affect a customer unless signed."

A *special* contract is contrasted with a *general* contract; and a bailment to carry, with acceptance by the bailee, either absolute or qualified, is probably the general contract intended; which bailment creates, by operation of law, many duties and rights distinct from contract, in respect of the acts to be done, and the persons interested therein who may sue thereon. But a special contract creates and defines, by its own terms, the rights and duties of the contracting parties between themselves: parties being as free to contract as they are to use their property, in any way that the law does not forbid, and the right to contract being the vital essence of trade. According to the defendant, this all-important right remains unaltered, except that the customer's signature is preappointed to be the only evidence of his agreement.

Thus, in this construction, all the words operate, and the effect is reasonable.

According to the plaintiff, the law before the statute was, that the carrier could in no way restrict his common law liability unless the customer consented to a special contract, so that all the rights of carriers under notices, could have been defeated if a customer offered to prepay the carriage; and he contended for the meaning of the enactment, expressed by *Jervis*, C. J., in 18 C. B. 829, viz., that Companies may make special contracts binding on their cus-

1859.  
  
 M·MANUS  
 v.  
 LANCASHIRE  
 AND  
 YORKSHIRE  
 RAILWAY Co.

1859.  
  
 M' MANUS  
 v.  
 LANCASHIRE  
 AND  
 YORKSHIRE  
 RAILWAY CO.

tomers, provided they are signed by the customers, and thought just, &c. by the Judge.

But, if the whole enactment relates to contracts only, the words "notices, conditions and declarations" are unaccountable.

If the liability could only be limited by contract with the customer, the words notices, &c. *given by the Company*, and conditions *made by the Company*, are inappropriate; mutual consent is the first element of contract, and the legislature cannot have thought that one-sided assent could create contract.

The use of different terms for the same idea in the same sentence is the essence of confusion; and the plaintiff imputes that confusion in supposing that "notices, conditions and declarations," in the first part of the section, mean the same idea as is denoted by "special contract" in the latter part of it. This he does, notwithstanding the certainty that the legislature, in the 11 Geo. 4 & 1 Wm. 4, c. 68, making *public* notices and declarations void, contradistinguished them there from special contracts; and if the legislature now intended to regulate personal notices and declarations, and still contradistinguished them from special contracts, the sequence of ideas would be reasonable, and the use of the words would be apt.

The plaintiff's construction also supposes that a proviso, which usually restrains, here operates to enlarge an enacting clause; thus, if the meaning is to be gathered from the words and context, they seem to afford many reasons for the defendants' view, and none for the plaintiff's.


When one of two constructions is to be chosen, expediency is some guide.

According to the defendants, the carrier may limit his common law *liability* by conditions which are thought just,

and the statute tends to give certainty to the law; for it defines, by referring to the Judge, the doubtful line between the carrier's right to qualify his acceptance, and the customer's right to reject the qualification; the statute also defines part of the proof required for a special contract.

According to the plaintiff, the intention was that contracts made by Companies for carriage, although valid against them absolutely, shall not be enforced for them, except on the contingency of the Judge thinking them just and reasonable. Now, as the profits from carrying depend much upon contracts for carrying, and as railway Companies, like other carriers, are perpetually infested by attempts at overreaching and fraud, to be defeated only by vigilance in making contracts and by the protection of the law in enforcing them, an intention to make their contracts uncertain appears to have the evil of taking from this property a security which belongs to all other property in trade. The evil also is greater in proportion as the contingency is uncertain; and the test of the just and reasonable in the person who happens to be Judge is peculiarly uncertain. Some Judges seem to have thought it just that the carrier should always pay for every damage and loss. In the minds of other Judges the just and reasonable is tested by an intuitive perception of right known only to themselves. Some Judges may think that a party to a bargain should take care of his own interest, and that if he makes a promise it is just he should keep it. Other Judges may attempt to know the interest of railways and customers respectively, and try the reasonableness of contracts by this knowledge; but their situation makes such knowledge almost impossible.

Upon the argument, this supposed hardship on the Companies was said to be justified by the assumption that carriers have a monopoly; and *Jervis*, C. J., in 18 C. B. 829, says, "the monopoly created by railways compels the

1859.  
  
**M'MANUS**  
 v.  
**LANCASHIRE**  
 AND  
**YORKSHIRE**  
**RAILWAY Co.**

1859.  
M'MANUS  
v.  
LANCASHIRE  
AND  
YORKSHIRE  
RAILWAY CO.

public to employ them, and therefore the legislature has imposed securities on them."

It is true that railway proprietors have produced accommodation so excellent that the public prefers it to every other; but that, for that reason, the prejudice against monopolies should be brought against railways is not right.

In monopolies, the seller of a bad article, by virtue of a grant, compels the buyer to pay too much: here, the buyer chooses an article on account of its goodness, and claims to compel the seller to take too little.

The public has granted nothing to railway Companies without exacting full price: their Act, their land and their works are all paid for. Subject to the conditions imposed originally, they have the same rights of property as other owners, and confiscation of any of those rights is not justified by an unfounded imputation of monopoly. The notion that customers of railways require protection, on account of incapacity to resist oppression, is not more true than the notion that, against a large proportion of customers, railway Companies stand in need of every aid the law can afford.

For these reasons, I think that the plaintiff's construction is wrong, and that his special contract binds him, notwithstanding the Judges may think some of its conditions to be not just, or not reasonable.

If the plaintiff is right on the first question, then the second arises, whether the condition that the owner should undertake all risk of conveyance, is just or reasonable.

This condition does not extend to wilful neglect, or other misfeasance; the general words respecting the Company not being responsible, are added as explanatory of the express words of condition, and are limited in the same way. This condition is imposed in respect of horses, and I find neither authority nor principle for holding that the defendants were bound to receive living animals, as common car-

riers. On the contrary, in *Carr v. Lancashire and Yorkshire Railway Company* (a), animals are shewn not to be within the principle which makes carriers responsible for goods. The temper and habits of the animal are more probably known to the owner than to the Company, and that knowledge is essential for the purpose of securing safe carriage. The treatment that would be harmless to some would be fatal to others, and it is more reasonable that the owner be bound to take precautions than the Company. If cattle are very wild they may break out of a truck that had confined many tamer creatures: *Chippendale v. Lancashire and Yorkshire Railway Company* (b). If a horse is very vicious he may kick down a partition strong enough for a quieter animal: *Shaw v. York and North Midland Railway Company* (c). If the owner chooses to employ the railway instead of the road for his animal, what principle of justice or reason makes it wrong for the Company to stipulate that the owner should take the risk of the journey? It is absurd to refer to the abstract sense of justice in the Judges a question which depends upon the mercantile calculation whether a payment of 2d. per mile per horse, to include a place for a man, is sufficient to pay for the risk of the journey as well as the conveyance; and it is equally absurd to suppose that calculation to be within the judicial cognizance of a Judge. Probably no Judge knows what labour, skill and capital were laid out in order to move these horses, what profit ought to be realised to make it a prudent investment of capital, and what ratio of profit 2d. per mile per horse is likely to give if the owner takes the risk. Unless he has that knowledge, he has not the data required for declaring the bargain made by the plaintiff with the Company to be so unjust, as that he should be allowed to

1859.

M'MANUS  
v.  
LANCASHIRE  
AND  
YORKSHIRE  
RAILWAY CO.

(a) 7 Exch. 707.

(b) 21 L. J., Q. B. 22.

(c) 13 Q. B. 347.

1859.  
M·MANUS  
v.  
LANCASHIRE  
AND  
YORKSHIRE  
RAILWAY CO.

break it, and to put on the Company the liability which they had agreed not to undertake.

But even if this general proposition cannot be maintained, here the plaintiff had the option of two conveyances, one at half the price of the other, and if he chose to take the lower price, and with it the greater risk, it is unreasonable and unjust in him to cast on the Company a loss which might not have occurred if he had taken the more expensive accommodation. I therefore answer the second question also in the affirmative, and in my opinion the defendants are entitled to judgment.

WILLIAMS, J.—Two questions were raised in this case. First.—Whether the clause of the 7th section of the Railway 'Traffic Act (17 & 18 Vict. c. 31), making void all notices, conditions and declarations made and given by the Company limiting their liability, unless such as the Court or the Judge trying any cause may adjudge to be just and reasonable, extends to cases where a special contract has been signed in conformity with the subsequent proviso in the section. Secondly.—Whether supposing it does so extend, the condition contained in the special contract in question ought to be adjudged just and reasonable.

As to the former of these questions, the arguments which the subject admits appear to have been exhausted by the Judges who gave their opinions in *Peck v. The North Staffordshire Railway Company* (a). And it is sufficient for us to say that, having fully considered them as well as the able arguments of the counsel in this Court, we agree with the opinion expressed by *Jervis, C. J.*, in *Simons v. The Great Western Railway Company*, that the true construction of the Act and the result of its provisions is this: viz., that the Company may make special contracts with

(a) 18 C. B. 805. 829.

their customers, provided they are just and reasonable, and signed; and whereas the monopoly created by railways compels the public to employ them in the conveyance of their goods, the legislature have thought fit to impose the further security that the Courts shall see that the condition or special contract is just and reasonable.

1859.  
M'MANUS  
v.  
LANCASHIRE  
AND  
YORKSHIRE  
RAILWAY Co.

In effect, before the statute, every case in which a special limited liability was substituted for the general common law obligation of the carrier, whether by notice acquiesced in, or document signed by the customer, was one of special contract, and the statute is to be construed with reference to that state of the law.

It remains to consider whether the condition or special contract in the case before us is just and reasonable. And we are of opinion that it is not. In order to bring the defendants within its protection, it is necessary to construe it as excluding responsibility for loss, occasioned not only by all risks of whatever kind directly incident to the transit, but also for that caused by the insufficiency of the carriages provided by the defendants, though occasioned by their own negligence or misconduct. The sufficiency or insufficiency of the vehicles by which the Companies are to carry on their business, is a matter, generally speaking, which they, and they alone, have, or ought to have the means of fully ascertaining. And it would, we think, be not only unreasonable, but mischievous if they were to be allowed to absolve themselves from the consequences of neglecting to perform properly that which seems naturally to belong to them as a duty. It is unreasonable that the Company should stipulate for exemption from liability from the consequence of their own negligence, however gross, or misconduct, however flagrant, and that is what the condition under consideration professes to do. That condition is therefore void, and the case stands simply

1859.  
 M·MANUS  
 v.  
 LANCASHIRE  
 AND  
 YORKSHIRE  
 RAILWAY Co.

upon the ground that the plaintiff has employed the defendants to carry his horse safely, and that they have used an insufficient and improper vehicle for that purpose, whereby the horse has been injured.

This being the opinion of the majority of the Court, the judgment of the Court of Exchequer is therefore reversed, and our judgment is for the plaintiff (a).

Judgment reversed.

(a) The judgment of *Erle*, J., was delivered in Hilary Vacation, February 16, when the decision of the Court was announced.

The judgment of *Williams*, J., on behalf of himself and the other members of the Court, was read in Easter Vacation, May 17.

## IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

Feb. 8.

WALKER v. GOE and Another, Clerks, &c.

An Act enabling navigation Commissioners to

**T**HIS was a proceeding in error on a judgment of the Court of Exchequer for the defendant, on a special case grant a lease of a canal contained a clause as follows:—In case the lessees during the term should permit the navigation to be out of repair, the Commissioners “are hereby authorized and required to give notice thereof to such lessees, &c., and in such notice to specify the particular repairs which ought to be done; and the Commissioners may by such notice require that such repairs should be commenced, proceeded with and finished within reasonable periods to be named by the Commissioners, and in case the lessees shall neglect to commence, &c., such repairs, &c., then it shall be lawful for the Commissioners and they are hereby authorized to take possession of the tolls, &c., and to cause such repairs to be done under their own direction, and to pay the necessary expenses of making such repairs out of the said tolls,” &c. The lease having been granted in pursuance of the Act, during its continuance one of the locks of the canal became out of repair, but the Commissioners, though they knew of the want of repair, gave no notice of it to the lessee though a sufficient time had elapsed for the giving of such notice. A barge entered the canal while the lock was so out of repair, but was prevented from getting out again by the falling in of the lock.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that, assuming a duty in the Commissioners to give notice to the lessee to repair, they were not liable in an action by the owner of the barge for neglecting to give such notice, inasmuch as the detention of the barge was not a damage naturally flowing from their neglect.

*Smith*, that no action was maintainable against the Commissioners for their neglect to give notice.

stated for the opinion of that Court (reported 3 H. & N. 395).

1859.

WALKER  
v  
GOE.

*Hayes*, Serjt., (*Boden* with him), for the plaintiff (*a*).—The Commissioners are liable in this action. The decision in the Court below proceeds on the ground that the damage sustained by the plaintiff was not the necessary consequence of the neglect of the Commissioners to give the lessee notice to repair. The case, however, bears a strong resemblance to that of *Gibbs v. The Trustees of the Liverpool Docks* (*b*). The Commissioners were aware of the want of repair of the lock, and they ought to have taken the necessary steps to cause it to be repaired. [*Williams*, J.—In *Gibbs v. The Trustees of the Liverpool Docks* (*b*) and *The Lancaster Canal Company v. Parnaby* (*c*) the Commissioners were in possession of funds which they ought to have applied towards the repairs of the dock.] It is true that in those cases the duty arose from the possession of funds, but here it is prescribed by the act of parliament. [*Wightman*, J.—Moreover, in the latter case the Commissioners were in the actual possession of the canal: that is not so here.] The duty of directing repairs is cast on the Commissioners; the lessee is only bound to do such repairs as they order. If the action had been brought against the lessee he would have said, in answer, that he could not shut up the canal, and that he had done such repairs as the Commissioners required him to do. [*Wightman*, J.—The Commissioners can only interfere where there is a default in the lessee.] The Act recites that Chaplin agreed to accept the trust and to do all the works which should be ordered to be done by the Commissioners for the sup-

(*a*) Before *Wightman*, J., *Williams*, J., *Crompton*, J., *Crowder*, J., *Willes*, J., *Byles*, J., and *Hill*, J.

(*b*) 3 H. & N. 165.

(*c*) 11 A. & E. 223.

1859.  
 WALKER  
 v.  
 GOE.

port of the navigation. The effect of the 9th and 28th sections is to give the Commissioners the entire superintendence over the repairs. [*Wightman*, J.—The primary duty to repair is on the lessee, but the Commissioners may require him to do so.] There is no power to pay out of the tolls any expenses of repairs except such as are ordered by the Commissioners. The payment of interest to the shareholders is subject to the cost of repairs (sect. 23), but, unless the repairs were ordered by the Commissioners, the shareholders would have a right to be paid first.—Then, with respect to the damages, a wrongdoer is responsible for all the consequences of his wrongful act. [*Hill*, J., referred to *Vicars v. Wilcocks* (a), 2 Smith's Lead. Cas. 430.] It was the duty of the Commissioners to give notice to the lessee, and if they had done so the lessee would have repaired and the lock would not have fallen in.

WIGHTMAN, J.—We are of opinion that the judgment of the Court of Exchequer ought to be affirmed. Some members of this Court are disposed to think that the judgment should be affirmed on the ground that the action is not maintainable; but we are all of opinion that it must be affirmed on the ground assigned by the Court below, viz. that the damage was not the proximate, necessary, or natural result of the neglect of the Commissioners to give notice. Assuming that it was their duty to give notice, the proximate cause of the damage was the falling in of the lock, and it was not the duty of the Commissioners to repair it; they were only to put the lessee in motion, and for that purpose, the Act enables them to give notice to the lessee, in case he permitted the navigation or works to be out of repair. The Act is not clearly worded in all its provisions, but, taking them altogether, it seems that the

(a) 8 East, 1.

primary duty to repair is on the lessee. In the recital of the Act it is stated that "Chaplin had proposed to advance all the money necessary for the repairs of the river, and to keep the same in good and sufficient repair, subject to the orders and directions of the Commissioners," &c., "which proposal had been approved of." So that the primary duty to repair is on the lessee, subject to the orders of the Commissioners as to any particular repairs they might think necessary. The Act goes on to say that "it had been ordered and agreed that the navigation and tolls should be vested in Chaplin for a term of ninety-nine years; and Chaplin had agreed to accept the trust and do all the works which should be ordered to be done by the Commissioners for the support of the navigation." But the question turns more directly on the 28th section, which provides that "in case the lessees or lessee in possession for the time being shall, at any time during the continuance of the said term, permit the said navigation or the works thereof, or any of them, to be out of repair, the Commissioners are hereby authorized and required to give notice thereof to such lessees or lessee, and in such notice to specify the particular repairs which ought to be done, &c., and in case the said lessees, or lessee shall neglect to commence, or to proceed with, or to finish such repairs in the manner so specified, then it shall be lawful for the said Commissioners, and they are hereby authorized, to take possession of the tolls, &c., and to cause such repairs to be done under their own directions." The expression "in case the lessees shall neglect such repairs," &c., shews that the primary duty to repair is on them, and that it is only in case of their neglect that notice to repair is to be given by the Commissioners. But it is argued that if notice had been given the repairs would have been done, and if they had been done the lock would not have fallen in. Suppose, however, the

1859.

WALKER  
v.  
GOE.

1859.  
WALKER  
v.  
GOE.

Commissioners had given notice, it does not follow that the lessee would have repaired, and if he did not the Commissioners were not bound to repair. Therefore the falling in of the lock cannot be considered as the natural and necessary consequence of the omission of the Commissioners to give the lessee notice to repair. The declaration alleges that, by reason of the Commissioners not giving notice, the works fell in; but they fell in by reason of the want of repair which the lessee was bound to do. We all agree that the ground assigned for the judgment of the Court below is right, and that upon that ground the judgment must be affirmed, though some of the members of this Court think that the Commissioners are not amenable to such an action as this.

WILLIAMS, J.—I am also of opinion that the judgment of the Court below ought to be affirmed. If the damage sustained by the plaintiff necessarily arose from the negligent conduct of the Commissioners, I think that the action would be maintainable.

CROMPTON, J.—It cannot be said that the damage was the natural consequence of the Commissioners not giving notice. I am also strongly of opinion that this is not a case in which an action can be maintained against the Commissioners. It was the duty of the lessee to repair; and such repair was to be merely under the superintendence of the Commissioners, who were to see that he did his duty.

**Judgment affirmed.**

1859.

## IN THE EXCHEQUER CHAMBER.

*(Appeal from the Court of Exchequer.)*

PAUL, Public Officer of STUCKEY'S SOMERSETSHIRE BANKING  
COMPANY, v. JOEL.

Feb. 8.

**T**HIS was an appeal against the judgment of the Court of Exchequer, discharging a rule to enter the verdict for the defendant pursuant to leave reserved at the trial (reported 3 H. & N. 455).

The holder of a bill of exchange, on the day after it became due, called at the office of J., the drawer, and on being told that he was engaged wrote on a scrap of paper and sent in to him the following notice:—  
“R.’s acceptance to J., 500l., due 12th January, is unpaid: payment to R. & Co is requested before four o’clock.”—  
*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the notice was sufficient.

*Hannen*, for the defendant (a).—*Solarte v. Palmer* (b) is a direct authority that this notice of dishonour is insufficient. That decision has never been reversed: *Everard v. Watson* (c); and the principle there laid down is, that a notice of dishonour must inform the party to whom it is addressed, either in express terms, or by necessary implication, that the bill has been presented for payment and dishonoured. In this case there is nothing to intimate to the defendant that the bill has been presented, unless the mere fact of the notice being given leads to that inference. Where a party has neglected to present a bill, this is the very form of notice which he would give. *Solarte v. Palmer* was acted on in *Strange v. Price* (d). Though the rule laid down in *Solarte v. Palmer* was somewhat qualified in *Bailey v. Porter* (e), still a notice of dishonour must convey an intimation that

(a) Before *Wightman*, J., *Williams*, J., *Crompton*, J., *Crowder*, J., *Willes*, J., *Byles*, J., and *Hill*, J.  
(b) 7 Bing. 530; in Dom. Proc.

2 Cl. & F. 93.

(c) 1 E. & B. 801.

(d) 10 A. & E. 125.

(e) 14 M. & W. 44.

1859.

PAUL

v.

JOEL.

the bill has been presented: *Allen v. Edmundson* (a). [Crompton, J.—When it is said that a bill has not been paid, it means that it has not been paid in the regular course.] In *Furze v. Sharwood* (b) several notices in similar terms to the present were held insufficient. [Crowder, J.—In *Hedger v. Stevenson* (c), Parke, B., said that it seemed to him enough, if it appeared by reasonable intendment, and would be inferred by any man of business, that the bill had been presented to the acceptor and not paid by him. In this case does it not appear by reasonable intendment, and would it not be inferred by any man of business, that the bill had been presented and not paid?—He also referred to Byles on Bills, p. 236, note, 7th ed.

*Archibald* appeared for the plaintiff, but was not called upon to argue.

WIGHTMAN, J.—We are all of opinion that the judgment of the Court of Exchequer ought to be affirmed. The case of *Solarte v. Palmer* is distinguishable, for there the notice did not state that the bill was unpaid, but merely demanded payment. That is the main ground of the decision; and that is relied on by the Lord Chancellor in his judgment. But in *Hedger v. Stevenson* it was laid down by Parke, B., that where the terms of the notice are such that it appears by *reasonable intendment*, and would be inferred by any man of business, that the bill has been presented to the acceptor and not paid by him, although it does not appear by *express terms or necessary implication*, that is sufficient. In *Bailey v. Porter* the defendant was informed that the acceptance due that day was *unpaid*; here there is the same expression, and there is added “payment is requested before four

(a) 2 Exch. 719.

(b) 2 Q. B. 388.

(c) 2 M. &amp; W. 799.

o'clock." *Bailey v. Porter* has been referred to on many occasions, and has always been considered an authority on this question.

Judgment affirmed.

1859.

PAUL

v.

JOEL.

## IN THE EXCHEQUER CHAMBER.

(*Appeal from the Court of Exchequer.*)

WILLIAMS v. EYTON.

Feb. 8.

**T**HIS was an appeal from the judgment of the Court of Exchequer in discharging a rule to enter the verdict for the defendant, pursuant to leave reserved at the trial (reported 2 H. & N. 771).

*M'Intyre* (*Morgan Lloyd* with him) argued for the defendant (*a*).—The argument was in substance the same as that in the Court below, and the same authorities were cited.

By The General Inclosure Act, 41 Geo. 3, c. 109, s. 8, in case the Commissioner shall be empowered to stop up any old or accustomed road passing through any part of the old inclosures, &c., the same shall in no case

be done without the concurrence or order of two justices. The 53 Geo. 3, c. lxxix. (The Flint Inclosure Act), by s. 1, appointed a Commissioner to carry the Act into execution, subject to such of the regulations, restrictions and provisions, &c., in the 41 Geo. 3, c. 109, as were not altered, varied, controlled by, or repugnant to, the provisions of that Act. Sect. 19 enacts, that it shall be lawful for the Commissioners to stop up any old or accustomed public road or roads over the marshes, commons and waste lands, subject nevertheless to the concurrence of two justices, and under such regulations as are contained in 41 Geo. 3, c. 109, and provided that the old roads should not be discontinued till the new roads were properly formed. The marshes were allotted in 1819, when a gate, which had since been kept locked, was put up across an old road, but the road had since been used by foot passengers occasionally. The award of the Commissioners, executed in 1830, set out the new roads, and directed the old roads to be stopped up. A certificate of two justices, that the new roads had been formed and completed, under the 9th section of 41 Geo. 3, c. 109, was put in and proved; but no order of two justices for stopping the old road was produced.—*Held*, in the Exchequer Chamber (affirming the decision of the Court of Exchequer), that it might be presumed that an order of two justices for stopping up the old road had been duly made.

(*a*) Before *Wightman, J., Williams, J., Crompton, J., Crowder,* *J., Willes, J., Byles, J., and Hill, J.*

1859.  
WILLIAMS  
v.  
EYTON.

*Welsby* (with whom was *Beavan* and *Coxon*) appeared for the plaintiff, but was not called upon to argue.

WIGHTMAN, J.—The question submitted for our consideration is, whether the Court of Exchequer, performing the functions of a jury, were at liberty to presume that the concurrence or order of two justices had been obtained for stopping up the road. So long ago as the 53 Geo. 3 the Flint Inclosure Act passed, and it refers to the General Inclosure Act, 41 Geo. 3, c. 109. The 19th section of the former Act empowers the Commissioners to stop up any roads, ways or paths, subject to the order and concurrence of two justices, and the provisions of the 41 Geo. 3, c. 109. An award was made by which the road in question was stopped up, but there was no evidence that an order of two justices had been obtained for that purpose. Then the question is whether such an order can be presumed. It appears that there had been an enclosure of the road for a period of about twenty-eight years, and we think that is sufficient to warrant the Court, standing in the place of a jury, in presuming that every thing was rightly done, and that an order of two justices was obtained. It is said that so far as regards foot passengers there was evidence of a continuous user; but we think that is not sufficient to rebut the presumption which arises from the lapse of twenty-eight years since the road was stopped up by the award made under the Inclosure Act. Whether foot passengers have been allowed to pass is hardly a question for the consideration of the Court: the question is, whether there is sufficient to satisfy us that a jury would have come to the conclusion that the order of two justices was obtained. For these reasons the judgment of the Court below must be affirmed.

Judgment affirmed.

1859.

## IN THE EXCHEQUER CHAMBER.

*(Error from the Court of Exchequer.)*

HILL v. FOX.

Feb. 8.

**E**RROR on a bill of exceptions.—The declaration was on an indenture, dated the 13th July, 1850, whereby the defendant covenanted to pay the plaintiff 2000*l.* with interest, on the 4th December following. The declaration set out the indenture, which recited that the plaintiff had lent to the defendant 2000*l.*, and, as a collateral security for the payment thereof, the defendant assigned to the plaintiff two policies of assurance, and covenanted to pay the premiums. The breaches assigned were: non-payment of the principal and interest, and the premiums.

Plea.—That, before the making of the indenture, certain persons were playing at a certain game, called horse racing; and the plaintiff won of the defendant certain sums of money, to wit 1650*l.*, by betting on the sides of the persons who did so play as aforesaid: that by the said indenture the defendant conveyed to the plaintiff the said instruments of insurance by way of mortgage; and that the said indenture was and is a mortgage within the meaning of the statute 9 Anne, c. 14, for preventing excessive and

The defendant, being indebted to the plaintiff and other persons for money lost by betting on a horse race, applied to the plaintiff for a loan. The plaintiff lent the defendant 2000*l.* upon the security of a deed, which assigned to the plaintiff certain policies of assurance, and contained a covenant by the defendant to pay the 2000*l.*, and interest. On the settling day the defendant paid the plaintiff his bets out of the 2000*l.* In an action by the plaintiff on the covenant, the

defendant pleaded that the deed was a mortgage security, part of the consideration for which was a gaming debt. At the trial the Judge told the jury that if the 2000*l.* was advanced in pursuance of a stipulation or agreement between the plaintiff and defendant that out of it the plaintiff should be paid the money which he had won of the defendant by betting, it was a mere colourable loan and evasion of the statute; but that if there was no such stipulation or agreement, and the plaintiff advanced the 2000*l.* as a loan for the defendant to dispose of as he pleased, the deed was valid, although the plaintiff expected to be paid out of the money so lent.—*Held*, in the Exchequer Chamber, on a bill of exceptions, that the direction was right.

1859.

HILL  
v.  
FOX.

deceitful gaming, and the 5 & 6 Wm. 4, c. 41, to amend the law relating to securities given for considerations arising out of gaming, usurious and other illegal transactions.—Averment: that the sum of 1650*l.*, so won as aforesaid, was and is part of the consideration of the said mortgage, within the meaning of the first mentioned statute.—Issue thereon.

The cause was tried before *Erle*, J., at the Surrey Spring Assizes, 1858. The defendant stated that he was connected with the turf, and had many bets with the plaintiff on horse racing prior to this transaction. He betted with the plaintiff on the Derby of 1850, and after that race was run he owed the plaintiff 1650*l.* Before the settling day he saw the plaintiff and told him that he had lost more than he could possibly pay him. The plaintiff then asked him how much he owed to other persons, and the defendant replied “less than 300*l.*” The plaintiff then agreed to advance him 2000*l.* upon condition that he paid the plaintiff’s account, which the defendant agreed to. The defendant went to the plaintiff’s solicitor and gave him a promissory note for 2000*l.*, payable on demand, and signed an agreement to deposit policies of assurance for 1500*l.* and to insure his life for an additional 500*l.*, and execute a mortgage of the policies. The defendant then received from the plaintiff’s attorney a cheque for 2000*l.*, which he got cashed and paid the plaintiff what he owed him. On cross-examination, the defendant stated that the plaintiff had frequently lent him money, as much as 600*l.* at a time.

The plaintiff stated that for many years he had race horses and betted largely. He had known the defendant for thirty years, and had always lent him money when asked for it, frequently as much as 500*l.* at time. On the Derby day of 1850, his horse was second. This 2000*l.* would not have been

lent if the plaintiff's horse had won, because the defendant would have won a large sum of money. After the Derby day, the defendant came to the plaintiff's house and said that he wanted 2000*l.*; that he had lost a great deal of money, and would be greatly obliged if the plaintiff would render him assistance by way of loan. The plaintiff said that all his money matters were managed by his solicitors, and that the defendant must go to them and tell them what security he would give, and, if they were satisfied, he would lend the defendant the 2000*l.* Nothing whatever was said about the defendant paying the 1650*l.* which he had lost, nor was there then, or at any other time whatever before he advanced the 2000*l.*, any condition or agreement made that the defendant should pay the 1650*l.*, or any other sum. The defendant was at Tattersall's on the settling day and paid the plaintiff what he owed him. It was much under 1650*l.*, and consisted chiefly of bets which the plaintiff had made for him, and which the plaintiff was liable to pay. There was never any agreement that the plaintiff was to receive back any portion of the loan. — On cross-examination, the plaintiff said that of course he assumed that the defendant would pay him on the settling day, as well as all other persons to whom he had lost: that he had lent the defendant the 2000*l.* for the purpose of settling his bets.

The learned Judge told the jury that if, in their opinion, the 2000*l.* was advanced in pursuance of a stipulation, or agreement between the plaintiff and the defendant, that out of it, the plaintiff should be paid by the defendant, money which the plaintiff had won of the defendant by betting, as stated in the plea, this would be a mere colourable loan of 2000*l.*, and a colourable evasion of the statute in such case made and provided; and the jury ought in that case to

1859.

HILL  
v.  
FOX.

1859.

HILL

v.

FOX.

find, that part of the consideration for the said indenture, was money won by the plaintiff of the defendant, in the manner stated in the plea; but, if there was no such agreement or stipulation, and the plaintiff advanced the 2000*l.* absolutely, as a loan, and put it into the hands of the defendant, as the lawful owner, to dispose of it as he pleased, and the defendant gave the deed to secure the payment of that loan, then the deed was a perfectly valid deed, although the plaintiff expected that he should be paid out of the said money so lent. His lordship also told the jury that in his opinion there is nothing illegal in betting: that the parties do not violate any law by making a bet, but that the law will not assist the winner in enforcing payment of it; and that a loan of money is not void although the lender believes that the borrower means to apply it in payment of a bet.

The jury found a verdict for the plaintiff for 2618*l.* 2*s.* 6*d.* The defendant's counsel then tendered a bill of exceptions to the above ruling, and, error having been assigned thereon, the case was now argued by

*Petersdorff*, Serjt., for the defendant (a).—The direction of the learned Judge was erroneous. It was calculated to lead the jury to suppose that, unless there was an absolute agreement that the plaintiff should be paid his bets out of the loan, they must find for the plaintiff. It should have been left to the jury to say what was the actual understanding and intention of the parties at the time the security was given and the money paid to the plaintiff: did they understand and intend that it was to be a simple loan of money, or was it a mere artifice and contrivance by which the

(a) Before *Wightman*, J., *Williams*, J., *Crompton*, J., *Crowder*, J., *Willes*, J., *Byles*, J., and *Hill*, J.

plaintiff was to get a security for a gaming debt? [*Williams, J.*—The learned Judge told the jury in effect that, if the defendant was bound to pay his gaming debt out of the loan, the security was void, but if there was no such stipulation, and the money when in the hands of the defendant was his own to dispose of as he pleased, then the deed was a valid security.] In *Grizewood v. Blane* (a), which decided that a colourable contract for the sale and purchase of railway shares, where neither party intends to deliver or to accept the shares but merely to pay “differences” according to the rise and fall of the market, is gaming within the 8 & 9 Vict. c. 109, s. 18, the Lord Chief Justice left it to the jury to say “what was the plaintiff’s intention, and what was the defendant’s intention, at the time of making the contracts—whether either party really meant to purchase or to sell the shares in question; telling them that, if they did not, the contract was in his opinion a gambling transaction and void.” In *Oliphant on Horses*, p. 303, 2nd ed., it is said that “the question to be left to the jury in such case is, whether it be a bonâ fide contract which each party at the time meant to perform, or whether the transaction was not a mere *bet* upon the future price of the commodity. And that, if neither party intended to buy or sell, it would be no bargain but a mere gambling transaction.” An authority there cited is the summing up of *Crompton, J.*, in a case of *Bennett v. Hall* (b).—He also referred to *Fisher v. Bridges* (c).

1859.  
  
 HILL  
 v.  
 FOX.

WIGHTMAN, J.—We are all of opinion that the direction of the learned Judge was correct. In substance it amounts to this—“If you believe that this deed, which upon the

(a) 11 C. B. 538.

(b) At Guildhall, Jan. 23, 1853.

(c) 3 E. & B. 642.

1859.

HILL

v.

FOX.

face of it purports to be a security for a sum of 2000*l.*, money lent, is merely a colourable transaction for the purpose of passing the money and carrying into effect an illegal agreement, then the deed is void; but if you are of opinion that there was no such stipulation, and that the plaintiff advanced the 2000*l.* as a loan, and put it into the hands of the defendant as the lawful owner, to do with it as he pleased, the deed is perfectly valid although the plaintiff expected to be paid his bets out of the money so lent. No doubt, upon other occasions, other Judges have used other expressions, but they in effect amount to the same thing. It is said that it should have been left to the jury to say what was the *understanding* between the parties. I should object to that, because it is difficult to say what an “understanding” means. I do not know a better word than “agreement” or “stipulation;” and the learned Judge subsequently explained what he meant by such a stipulation or agreement as would have the effect of making the transaction illegal. There is no objection to the direction of the learned Judge, and the judgment of the Court below must be affirmed.

Judgment affirmed.



# Exchequer Reports.

---

EASTER TERM, 22 VICT.

---

BINET v. SUSAN PICOT.

1859.

May 11.

*FIELD* had obtained a rule to shew cause why the writ of summons and service thereof should not be set aside for irregularity. The rule was obtained on an affidavit by the defendant, sworn at St. Helier in the island of Jersey, that she was served at St. Helier, with the copy of the writ of summons annexed to the affidavit, which commanded the defendant to cause an appearance to be entered within fourteen days, and was indorsed for service out of the jurisdiction of the Court: that, previously to being served with the writ, she had received a letter, purporting to be signed by the plaintiff's attorney, applying for compensation for the breach of her promise to marry the plaintiff, and threatening to proceed with an action to recover damages for the same, unless an offer of compensation was made: that the cause of action, if any, which the plaintiff had or might have against her arose within the island of Jersey and not elsewhere, and no cause of action by the plaintiff against her arose in respect of the breach of a contract made in any other place than the island of Jersey, and that the plaintiff and defendant were both natives of Jersey where they were domiciled. This affidavit was sworn before J. Le Bailly,

A writ, issued in pursuance of the 18th section of the Common Law Procedure Act, 1852, for service, and served on, a British subject out of the jurisdiction, may be set aside, on the application of the defendant, if it is shewn that there was no cause of action which arose within the jurisdiction.

1859.

BINET

v.

PICOT.

one of the magistrates of the Royal Court of Jersey. There was also an affidavit that J. Le Bailly, as jurat or magistrate of the Royal Court, had authority to administer an oath, and his handwriting was identified.

In an affidavit in answer the plaintiff swore that in April, 1856, the defendant came from Jersey to London and remained for some little time, during which he was constantly in her society: that while there, within the jurisdiction of the Court, the defendant promised to marry the plaintiff on his return from a voyage which he was then about to make to India: that when the defendant promised to marry him, it was agreed that when the marriage was solemnized they should take a house and reside in London: that the defendant had refused to perform her promise, and her refusal to do so was contained in several letters received by the plaintiff in London.

*Mathew* shewed cause (*a*).—This is an application to set aside a writ of summons, issued in pursuance of the 18th section of the Common Law Procedure Act, 1852, on the ground that there was no cause of action which arose within the jurisdiction of the Court. The writ is regular. In *Forbes v. Smith* (*b*), which was a case similar to the present, *Purke, B.*, said:—"The statute does not require either a statement in the writ itself, or an affidavit before issuing it, that the cause of action arose within the jurisdiction of the superior Courts. Therefore there is no irregularity in the writ itself, although the substituted mode of proceeding under it could not be applied unless the cause of action arose within the jurisdiction of the Court," &c. If there is no cause of action within the jurisdiction, the section in question provides an adequate protection by making it

(*a*) April 15. Before Pollock and Channell B.  
C. R. NICHOLS B. WILSON B. (*b*) 10 Exch. 717.

essential, in order to enable the plaintiff to proceed, that he should satisfy a Judge "by affidavit that there is a cause of action which arose within the jurisdiction." Under the old practice the plaintiff might have proceeded to outlawry. Secondly, there was a confirmation of the promise and a breach within the jurisdiction. That constitutes a cause of action. [*Bramwell*, B.—I doubt whether it is more than evidence of a prior promise.]

1859.

*BINET*  
v.  
*PICOT.*

*Field*, in support of the rule.—The writ ought to be set aside. It could not have been issued except under the provisions of the 18th section, and it can only be used for the purpose of being served out of the jurisdiction. The plaintiff's affidavit does not contradict the defendant's oath that the cause of action did arise in Jersey. If there was a binding contract previously existing, the further promise when the parties were in London was a mere nudum pactum.

*Cur. adv. vult.*

POLLOCK, C. B., now said:—This was a case in which a writ, issued out of this Court, was served in the island of Jersey. The plaintiff was called upon by the rule to shew cause why the writ and service of it in Jersey should not be set aside. The defendant, a resident in Jersey, made the application on the ground that the cause of action did not arise in this country. The 18th section of the Common Law Procedure Act, 1852, which enables plaintiffs to sue persons who are abroad by issuing writs from the Courts of this country, and serving them out of the jurisdiction, requires that the cause of action shall arise in this country and not abroad. The defendant applied to the Court to set aside the writ and the service of it, very distinctly stating that the cause of action did not arise in this country. Cause

1859.

BINET

v.

PICOT.

was shewn, and an affidavit was produced on the part of the plaintiff, the object of which was to shew that the cause of action did arise in this country. On reading the affidavit we think that the answer is not made out in so satisfactory a manner as to induce the Court to be of opinion that the cause of action really did arise in this country. We are very much inclined to think that it did not: it is positively sworn to by the defendant, and the answers and explanations of the plaintiff are by no means satisfactory. We are therefore of opinion that the rule ought to be made absolute.

Rule absolute.

April 16.

COOK v. PAXTON.

The Army Works Corps, which served in the Crimea under an agreement with the Government, are not soldiers, although subject to the provisions of the Mutiny Act, 19 & 20 Vict. c. 10; and therefore they are not entitled to the certificate of discharge required by the Articles of War to be given to dismissed soldiers.

**ACTION** for the breach of an agreement to employ the plaintiff as one of the civil engineering corps in the Crimea.—The first count of the declaration set out the agreement (*a*), and, after averring that the plaintiff joined the corps, embarked for the Crimea, and had done all things on his part to entitle him to be employed for two years, alleged as breaches that, although no notice was given to the plaintiff that his services were dispensed with, the defendant would not continue to employ the plaintiff until the expiration of two years, and did not during such period supply him with rations or pay his wages.—There was also a count for work and labour.

Plea to the first count.—That, before the expiration of the period of two years in that count mentioned, the defendant provided the plaintiff with a free passage to England, and gave notice to the plaintiff that his services were dispensed with, and paid the plaintiff the gratuity of 16*l.* and

(*a*) *Post*, p. 369.

his wages up to the time of his discharge; and thereby, before the expiration of the said period of two years, and before the committing by the defendant of the alleged breach of the agreement, the agreement was terminated according to the terms of the same.—To the other count: Never indebted.—Issues thereon.

1859.  
 ~~~~~  
 COOK  
 v.  
 PAXTON.

At the trial, before *Martin, B.*, at the London Sittings after last Hilary Term, it appeared that the plaintiff and a number of other men were employed by the defendant, who acted on the part of the Government, to serve in the Army Works Corps during the war in the Crimea. On the 1st November, 1855, the plaintiff signed the agreement declared on, which was as follows:—

“ No. 3619.

“ *Name of person engaged—John Cook.*

“ ARMY WORKS CORPS.

“ ARTICLES OF AGREEMENT.

“ Whereas her Majesty's Government have directed Sir Joseph Paxton to organize and dispatch to the Crimea a civil engineering corps, for the purpose of assisting the operations of the allied forces in conducting and carrying on the present war: And whereas, William Thomas Doyne, Esq., civil engineer, has been recommended by the said Sir J. Paxton, and has been commissioned by her Majesty to get together and form such engineering corps, and, when formed, to superintend and take the command of the same: Now these presents witness, that the undersigned persons do, and each of them doth, hereby agree with the said Sir J. Paxton, and also with the said William Thomas Doyne, and with the officer in command of the said corps for the time being, to join the said corps and to enter into the service of the said W. T. Doyle and of the officer in command of the said corps for the time being, and that they will, whenever required, upon a free passage being

1859.

COOK  
v.  
PAXTON.

provided for them for that purpose, embark for the seat of war; and, upon their arrival there, be employed with the Ordnance, or otherwise, in assisting the operations of the allied forces in the Crimea, or elsewhere; and will in all things act under and conform to the orders, rules and regulations to be laid down and given by the officer in command of the said corps for the time being, or by those placed by the said officer in authority over them, in the execution of all works required to be executed by them; and will promptly and faithfully execute all orders to the best of their skill and ability, and conduct themselves soberly and steadily; and will, in all things connected with the execution of the said works, submit to such regulations as may be directed by the proper authorities; and shall and will, while this engagement lasts, *be subject to the Mutiny Act and the Articles of War* for the time being in force. And the said Sir J. Paxton and W. T. Doyne do, and each of them doth, hereby agree with the undersigned, and each of them, that they shall be supplied with an outfit on going on board ship, and with a free passage to the seat of war; and shall be employed in the capacity stated opposite their names respectively in such corps as aforesaid for a period of two years; and, from and after their embarkation on board ship, they shall be supplied with rations of the like quantities and qualities as shall be supplied to the soldiers in her Majesty's army with whom they shall be serving, and shall receive, in addition, wages for such services at the rate per week (a) stated opposite their names respectively, with a pension the same as is paid in the army in case of disability. And the undersigned do, and each of them doth, hereby agree that they will continue in the service of the said W. T. Doyne, and of the officer in

(a) This was 24s. from the time of making the agreement until the day of embarkation for the Crimea, and after that day 40s.

command of the said corps for the time being, for such period of two years, and for a further period of one year, after the expiration of such two years, if required by the said W. T. Doyne or such officer as aforesaid. And the undersigned do, and each of them doth, further agree that the said Sir J. Paxton or the said W. T. Doyne, or the officer in command of the said corps for the time being, may at any time during such period of two years and further period of one year as aforesaid, give notice to them, or any of them, that their services are dispensed with; in which event or at the expiration of this agreement by effluxion of time, each of the undersigned shall, if his conduct is approved by the said W. T. Doyne or the officer in command of the said corps for the time being, be entitled to receive the amount of gratuity (a) stated opposite their names respectively. And the said Sir J. Paxton and W. T. Doyne further agree that, upon the termination and fulfilment of this agreement, the undersigned shall be provided with a free passage to England. And the undersigned further agree that, until they are requested to embark for the seat of war, they will execute such work as may be required by the said Sir J. Paxton, or by such person or persons as may be placed by the said Sir J. Paxton in authority over them, receiving wages for such work at the rate per week stated opposite their names respectively.—Witness the hands of the parties, &c.”

On the 1st December, 1855, the plaintiff embarked for the Crimea, where he served under the agreement until the 27th April, 1856, when he was ordered to go on board a vessel which sailed for England, and arrived at Spithead about the 19th May. On his arrival he was paid 2*l.* to enable him to proceed to London. He was then directed to go to the Crystal Palace at Sydenham, which he did on the

(a) This was 16*l.*

1859.

COOK  
v.  
PAXTON.

1859.  
COOK  
v.  
PAXTON.

23rd May, and there he was paid his wages up to the day of landing and received a gratuity of 16*l*. He afterwards went to a government office at Whitehall and applied for his discharge, but could not get it. He then applied to the defendant for his discharge and his pay up to the time it was given. This was refused, as the government required that the discharge should be dated on the day of his arrival in England.

It was objected on the part of the plaintiff that the first plea was not proved, since the plaintiff was entitled to his discharge under the Mutiny Act. The learned Judge reserved the point, and having left the questions to the jury, they found that the plaintiff had notice of his discharge on the 23rd May and was entitled to his wages up to that day; and a verdict was given for him with 40*s*. damages.

*Lush* now moved to increase the damages, the amount to be assessed by the Master.—The Mutiny Act in force when this agreement was signed (18 & 19 Vict. c. 11), would not include this corps; but by the Mutiny Act, 19 & 20 Vict. c. 10, s. 2, “All the provisions of the Act shall apply to all persons who are or shall be serving in the Land Transport Corps or Army Works Corps.” By section 1, her Majesty is empowered “to make Articles of War for the better government of her Majesty’s forces,” &c.; and one of the articles made under that section is,—“Soldiers having been duly enlisted and sworn shall not be dismissed our service without a certificate of discharge.” The plaintiff has never been discharged from the service, and consequently is liable to be arrested at any time and punished as a deserter.

POLLOCK, C. B.—It is clear to my mind that this corps were not soldiers. They were made amenable to the last Mutiny Act, in order that they might be under that dis-

cipline which is necessary for an army; but they were not enlisted as soldiers, nor are they liable to be sent back to the Crimea or treated as deserters. Indeed, if they were soldiers, I do not see how they could maintain an action for their pay. My brother *Bramwell* concurs in this view, but as my brother *Martin* thinks the matter worthy of consideration, you may take a rule if you think fit.

1859.  
 COOK  
 v.  
 PAXTON.

BRAMWELL, B.—I think that these men were not soldiers, but even if they were they could not rely on that clause in the Articles of War. It is not a provision for their benefit, but a direction by her Majesty to the person who discharges them.

*Lush* asked for time to consider whether he would take a rule, and a few days afterwards stated that he declined to do so.

GODWIN v. CULLEY.

May 5.

EDWARDS and GODWIN v. CULLEY.

IN the first of the above actions, the first count of the declaration was on a covenant by the defendant to pay the plaintiff 100*l.*, with interest, on the 7th of March, 1848.—The second count was on a promissory note made by the

In 1847, the plaintiffs, who were solicitors, lent to the defendant 100*l.* on a mortgage, 40*l.* on a promissory note, and they had

also a claim against him for costs. In 1857, the defendant wrote to the plaintiffs as follows:—“Sept. 26. I wish to inform you that I received yours this morning. I am going to leave my situation on the 1st November, and when the policy is paid on the 29th October, I hope that you will have the whole of your account ready for me, as I hope to be with you on that day.”—“Oct. 25. Mr. V., when here on Saturday, stated that the amount due against me was about 280*l.* Of course this includes the 100*l.* and interest that I had some years since, and the 40*l.* promissory note that I jointly signed with the late Mr. B. Of course you are aware that you have 25*l.* to my credit that Mr. Y. paid over when he could not complete the purchase of the property in the High Street.”—*Held*, a sufficient acknowledgment of the debt to take the case out of the Statute of Limitations.

1859.  
 ~~~~~  
 GODWIN  
 v.  
 CULLEY.

defendant and one H. Birt, deceased, for payment to the plaintiff on demand of 40*l*. and interest.

The defendant pleaded to the second count, that the alleged cause of action did not accrue within six years before this suit.—Upon which issue was joined. Judgment by default was signed on the first count.

At the trial, before *Brammell*, R., at the *Middlesex* Sittings in last Hilary Term, it appeared that the plaintiff and one Edwards, who were in partnership as solicitors at Winchester, had been concerned for the defendant for several years. In the year 1847, the plaintiff lent to the defendant, of the partnership monies, 100*l*. on a mortgage, which contained the covenant declared on in the first count, and 40*l*. on the promissory note mentioned in the second count. The firm had also a claim against the defendant for a bill of costs. In order to take the case out of the Statute of Limitations, the plaintiff gave in evidence the following letters written by the defendant to the firm:—

“ 19, Liverpool Street, London,

“ Gentlemen,

“ Sept. 26, 1857.

“ I wish to inform you that I received yours this morning. I am going to leave my situation on the 1st November, 1857, and when the policy is paid on the 29th October, I hope you will have the whole of your accounts ready for me, as I hope to be with you on that day.

“ Yours, &c.

“ Alfred Culley.”

“ 19, Liverpool Street, King’s Cross, London.

“ Gentlemen,

“ Oct. 5, 1857.

“ Mr. Ventham, when here on Saturday, stated that the amount due against me was about 280*l*. Of course this includes the 100*l*. and interest that I had some years since, and the 40*l*. promissory note that I jointly signed with the

late Mr. Henry Birt. Of course you are aware that you have 25*l.* to my credit, that Mr. Young paid over when he could not complete the purchase of the property in the High Street.

“Yours, &c.

“Alfred Culley.”

1859.  
  
 GODWIN  
 v.  
 CULLEY.

It was submitted, on behalf of the defendant, that the above letters were not a sufficient acknowledgment of the liability to take the case out of the Statute of Limitations. The learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter the verdict for him.

*Slade*, in the same term, obtained a rule nisi accordingly ; against which

*Collier* and *Karslake* now shewed cause.—The letters are a sufficient acknowledgment of the debt to take the case out of the Statute of Limitations. In the first letter the defendant asks the plaintiff to have his account ready by a certain day. In the second letter the defendant admits in terms that the amount due from him to the plaintiff is about 280*l.*; and that this is composed of three items, the 100*l.* and interest, secured by the deed, the 40*l.* due on the promissory note, and the remainder for costs ; and the defendant claims to have credit for 25*l.* [*Channell*, B.—It amounts to this—I owe you this debt and I will pay it you, but I want 25*l.* deducted.] In *Sidwell v. Mason* (*a*) the following letter was held a sufficient acknowledgment:—“ I have received your bill. It does not specify sufficiently to which cottages the work is done, for instance (as to some of the items) I do not know where all this is done. I shall feel obliged if you will more particularly explain. It is my wish to settle your account immediately, but being at a distance I wish everything explicit and correct. I have asked

(*a*) 2 H. & N. 306.

1859.

GODWIN

CULLEY.

H. to mark the agreements and send them to me, and I will return them by the first post with instructions to pay if correct." *Bramwell*, B., there said, "It is enough, if there is an acknowledgment unaccompanied by expressions which control its effect." [*Channell*, B.—The acknowledgment must be in terms so distinct and unqualified, that a promise to pay on request may be reasonably inferred from it: *Chitty on Contracts*, p. 726, 6th ed.] In *Rackham v. Murriott* (a) there was no definite promise to pay, but merely an expression by the defendant of a hope that at some future period he might be enabled to make a satisfactory arrangement. In *Colles v. Stack* (b), the plaintiff having applied to the defendant for payment of a debt, the defendant wrote in answer,—“I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are for a short time, and all will be right. The works I have been appointed to, but they are not yet worked with the full complement of labour; this term will decide the matter:” and that was held a sufficient acknowledgment. *Waller v. Lacy* (c) is an authority that the amount need not be specified in the acknowledgment.—They also referred to *Hart v. Prendergast* (d).

*Slade*, in support of the rule.—The words of the 9 Geo. 4, c. 14, s. 1, are, that “no acknowledgment or promise by words only shall be deemed sufficient,” &c., “unless such acknowledgment or promise” shall be in writing. In order to revive the liability of the debtor after the expiration of six years, by a subsequent acknowledgment or promise, there must be proof of some writing signed by himself, either containing an express promise to pay the debt, or being in terms from which an unqualified promise to pay is neces-

(a) 1 H. &amp; N. 234.

(b) 1 H. &amp; N. 605.

(c) 1 Man. &amp; G. 54.

(d) 14 M. &amp; W. 741.

sarily to be implied: Jervis's New Rules, p. 350, note. The second letter is merely a statement by the defendant that the plaintiff's agent had called on him and said that the amount due against the defendant was 280*l.* Such a statement made by word of mouth, before the 9 Geo. 4, c. 14, would not have been sufficient. A petition to the Court of Bankruptcy, under the 7 & 8 Vict. c. 70, signed by an insolvent, is not a sufficient acknowledgment of a debt set out in his schedule, so as to take the case out of the Statute of Limitations: *Everett v. Robertson* (a). That case shews that there may be a most unqualified admission of the debt, and yet it may not be sufficient to take the case out of the statute. [*Martin*, B.—It has been decided that an admission to a third person is not sufficient. *Pollock*, C. B.—It must be an admission from which a promise to pay may be inferred.] Here there is no unqualified admission: the defendant informs the plaintiff that his agent has said that the debt is 280*l.*, and he asks the plaintiff whether that includes certain claims. If an admission at all, it is an admission of the bill of costs, and that is not due to the plaintiff, but to him and his partner.

1859.  
  
 GODWIN  
 v.  
 CULLEY.

---

EDWARDS AND GODWIN *v.* CULLEY.

This was an action to recover 83*l.* 8*s.* 4*d.*, being the balance of the plaintiffs' bills of costs, as solicitors, after giving credit for 25*l.* and 2*l.* 11*s.* 8*d.* received on account of defendant. The same question was raised as to the Statute of Limitations, and the same letters were in evidence as in the preceding case. A verdict was found for the plaintiffs for the amount claimed, and leave was reserved to the

(a) 28 L. J. Q. B. 23.

1859.  
—  
GODWIN  
v.  
CULLEY.  
EDWARDS  
AND  
GODWIN  
v.  
CULLEY.

defendant to move to reduce the amount by the items beyond six years from the commencement of the action. A rule nisi having been obtained accordingly,

*Collier* and *Karslake* now appeared to shew cause, but the Court called on *Slade* to support the rule, and he stated that he had nothing to add to his argument in the preceding case.

POLLOCK, C. B.—I am of opinion that the rule in each case ought to be discharged. Upon a comparison of all the authorities, there is no doubt as to the proper construction of the 9 Geo. 4, c. 14, viz. that what would formerly have taken a case out of the Statute of Limitations, if the acknowledgment had been by word of mouth, is now sufficient if the acknowledgment is in writing. Then the question is whether the acknowledgment contained in these letters would have been sufficient if the 9 Geo. 4, c. 14, had not passed. A bare acknowledgment is clearly insufficient. For instance, if a debtor had written in a book a private memorandum of his debt, and the creditor got hold of the book and produced it in Court, that would not be an acknowledgment to take the case out of the statute, because no promise to pay could be inferred from it. There must be an acknowledgment amounting to a promise, either to the creditor or his agent, to pay the debt. Mr. *Slade* says that this letter cannot be an acknowledgment to the plaintiff in the first action, because, if an acknowledgment at all, it is an acknowledgment to him and his partner. But it is only a technical rule which requires all co-contractors to join in an action; and the question who is to bring the action is very different from the question as to an acknowledgment of the debt. With respect to that, the defendant refers to three claims which he admits to be in

existence: he admits the 100*l.* and interest, the 40*l.* due on the promissory note, and a further claim for costs. I think that is a sufficient acknowledgment, for it is made under such circumstances that anybody who reads it would infer a promise to pay. In addition, he couples it with a statement that he is entitled to credit for 25*l.*, and therefore the plaintiff cannot claim the whole amount of 280*l.* The letters being addressed to the two partners all difficulty with respect to the second action is removed, and therefore in each action the rule will be discharged.

1859.  
 ~~~~~  
 GODWIN  
 v.  
 CULLEY.  
 EDWARDS  
 AND  
 GODWIN  
 v.  
 CULLEY.

MARTIN, B.—I am of the same opinion. So far as any definition of an acknowledgment is necessary, I think the one given by my brother *Bramwell* in the case of *Sidwell v. Mason* (a) is the best; but we must always go back to the words of the statute, and they are “that no acknowledgment or promise by words only shall be deemed sufficient evidence of a *new or continuing contract*, &c., unless such acknowledgment or promise shall be in writing.” It is therefore clear from the words of the Act that the acknowledgment must be such as to have that effect, and I think that the word “promise” shews that there must be a promise to the person to whom the acknowledgment is made. A statement to a third person, like the insertion in a schedule of the debt, would not be that species of acknowledgment which the statute contemplates. But I agree with the Lord Chief Baron, that what would have been a sufficient acknowledgment before the 9 Geo. 4, c. 14, if made by word of mouth, will now be sufficient if in writing. Then the question is whether these two letters are a sufficient acknowledgment. I do not put the first out of consideration, though I think the second is of itself sufficient. If the first letter had stood alone, perhaps it

(a) 2 H. & N. 306.

1859.  
 GODWIN  
 v.  
 CULLEY.  
 EDWARDS  
 AND  
 GODWIN  
 v.  
 CULLEY.

would not have been sufficient, for it merely amounts to this—"Some accounts are due from me to you, which I wish you to have ready on a certain day." But then the defendant writes thus—"Mr. Ventham, when here on Saturday, stated that the amount due against me was about 280*l*. Of course this includes the 100*l*. and interest that I had some years since, and the 40*l*. promissory note that I jointly signed with the late Mr. Henry Birt." That is, I do not exactly know whether 280*l*. is the amount which I owe you: there is the 100*l*. and interest, the 40*l*. promissory note, and the balance is the account you have against me for costs. The defendant then adds, "Of course you are aware that you have 25*l*. to my credit." What does that mean? "I owe you a sum which is said to be 280*l*.; that I do not admit, for an amount of 25*l*. must be taken off it." That is clearly an acknowledgment that a sum of money is due to the plaintiff, from which the defendant is entitled to credit for 25*l*.

BRAMWELL, B.—I am also of opinion that both rules ought to be discharged. These cases are always unsatisfactory, as they run so close to each other; and for this reason—the statute does not require any formal document, but any writing from which it can be collected that there is an absolute and unqualified acknowledgment of the debt is sufficient. Therefore it must always be a matter of uncertainty whether the particular letter brings the case within the rule. I agree that an admission to a third person would not be sufficient. In *Grenfell v. Girdlestone* (a) Alderson, B., said, in the course of the argument, "There must be that from which a continued contract may be inferred. If a man were to write a letter to a third person acknowledging a debt, that would not take it out of the

(a) 2 Y. & C. 676.

statute." Here the letters are addressed to the plaintiffs in these actions. Then, is there anything to qualify the acknowledgment? In my opinion there is not. It is an acknowledgment of two certain debts, viz. 100*l.* and 40*l.*, and an uncertain debt; and a statement that 25*l.* is to be deducted from the whole.

Rule discharged.

1859.

GODWIN  
v.  
CULLEY.  
EDWARDS  
AND  
GODWIN  
v.  
CULLEY.

FRANCIS SHAND and A. SHAND v. WILLIAM SANDERSON.

April 27.

**D**ECLARATION.—That C. Shand & Co. caused to be shipped at Madras, upon a ship called the "Sanderson," of which the defendant was owner and one J. S. was master, certain bags of sugar, and thereupon the said J. S., as master, and on behalf of the defendant as owner, made and executed and delivered to C. Shand & Co. a certain bill of lading for the said bags of sugar in the words following, that is to say: "Shipped in good order and well conditioned by C. Shand & Co., in and upon the good ship called the 'Sanderson,' whereof is master for this voyage J. S., and now riding at anchor in the roads of Madras, and bound for London, 3616 bags sugar, being marked and numbered as in the margin; and are to be delivered in the like good order and well conditioned at the aforesaid port of London, the act of God, the Queen's enemies, fire, all and every other dangers and accidents of the seas, rivers and navigation, of whatever nature or kind soever, unto order or to assigns, on their paying freight for the said

By a charter-party, made between the defendant and H., a ship was chartered to proceed to Madras and load a cargo there from the agents of H., and being so loaded proceed to London and deliver the same on being paid freight at 3*l.* 15*s.* a ton, &c.; "the captain to sign bills of lading for his cargo for any rate of freight required, without prejudice to this charter-party." C. S., who acted as agent of H. at Madras in respect of the charter-party, by his directions pur-

chased sugars and loaded them on board. The captain, at the request of C. S., signed a bill of lading, deliverable to the order of C. S. at 1*l.* per ton freight. H. stopped payment and never paid for the sugar. The sugar having arrived in London.—*Held*, that C. S., or the parties in London who represented him, were entitled to the sugar on payment of the bill of lading freight.

1859.  
SHAND  
v.  
SANDERSON.

goods at the rate of one pound sterling per ton of 20 cwt. net, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished the others to stand void. Dated in Madras, 1857. Weight and contents unknown to — (Signed) J. S.” And afterwards, and after the passing and coming into operation of the 18 & 19 Vict. c. 111, C. Shand & Co. indorsed the said bill of lading for valuable consideration, and the plaintiffs, before the refusal to deliver hereinafter mentioned, became and were the indorsees and holders of the said bill of lading for value, and entitled to the property in the said bags of sugar.—Averments: that the said bags of sugar were carried to and arrived at London according to the tenor of the said bill of lading; and that they, the plaintiffs, then and still being the indorsees and holders of the said bill of lading, and entitled to the delivery of the said bags of sugar as aforesaid, were ready and willing, and offered, to pay freight for the said bags of sugar, according to the tenor of the said bill of lading, and to have the same delivered to them; and the plaintiffs did everything on their part to be done and everything happened to entitle them to have the said bags of sugar delivered to them accordingly, on payment of the said amount of freight: Yet the defendant would not deliver, or permit to be delivered, to the plaintiffs the said bags of sugar, except on payment of a larger amount of freight than that mentioned in the bill of lading, and the plaintiffs were compelled to pay such larger amount of freight in order to obtain the sugars.

Fourth plea.—That, before the signing of the bill of lading, a charter-party was made between the defendant and one Hicks, respecting the employment of the said ship in the voyage in the bill of lading mentioned, which was as

follows : “ It is this day mutually agreed between William Sanderson, owner of the good ship or vessel called the ‘ Sanderson,’ &c., and G. F. Hicks, &c., that the said ship, being tight, staunch, &c., shall proceed to Madras and receive orders to load there, &c., and load from the factors of the said affreighters a full and complete cargo of lawful merchandize, &c.; and, being so loaded, shall there-with proceed to Queenstown, &c., for orders to proceed to London, or a safe port on the Continent, &c., and deliver the same on being paid freight as follows : at and after the rate of 3*l*. 15*s*. sterling per ton of 20 cwt. net delivered, if discharged in London ; 10*s*. per like ton additional, if discharged on the Continent, as above, for rice, sugar and saltpetre ; other goods in proportion, according to the Honourable East India Company’s schedule of tonnage, in full of all port charges and pilotages, as customary, (the act of God, the Queen’s enemies, restraints of princes, &c., excepted). The captain to sign bills of lading for his cargo for any rate of freight required, without prejudice to this charter-party. The freight to be paid, on unloading and right delivery of the cargo, in cash at two months from date of report of vessel inwards at the Custom House, London, or in cash on right and true delivery if discharged on the Continent, &c.” That C. Shand & Co., of Madras, acted as agents for Hicks in respect of the charter-party, and by his directions, and before the ship arrived at Madras, purchased sugars to load on board the ship : that the ship arrived at Madras and was loaded with the said sugars by C. Shand & Co. : that J. S., as master, on behalf of the defendant as owner, at the request of C. Shand & Co., as agents of Hicks, and according to the terms of the charter-party, of which C. Shand & Co. then had full notice, signed the bill of lading : that C. Shand & Co., by the directions of Hicks, drew for the cost price of the sugars certain bills

1859.  
  
 SHAND  
 v.  
 SANDERSON.

... of exchange of ... in London, and ... to ... Bank and the ... London and ... respectively, ... the said bills ... to secure the ... that before ... & Martinie ... thereupon the ... were dis- ... and were taken up and ... and thereupon the ... and delivered the ... that the plaintiffs carry on business ... at Madras: that the ship arrived in London, and that afterwards, more than two months from the date of the report of the vessel ... at the Custom House, London, the plaintiffs, as the holders of the bill of lading, requested the defendant to deliver to them the sugars, on payment of the freight in the bill of lading mentioned: that thereupon the defendant requested the plaintiffs to pay him the freight of the sugars, according to the terms of the charter-party, and refused to deliver the sugars to the plaintiffs until the freight of the ... according to the terms of the charter-party: ... the plaintiffs did not pay the last mentioned freight.

... the defendant ... the plaintiffs ... the freight in ... in the ... by ...

in London and elsewhere in England, well known, and approved of at the time of making the charter-party, and of which Hicks and the defendant and the brokers who made the charter-party had notice, the words "the freight to be paid, on unloading and right delivery of the cargo, in cash at two months from date of report of vessel inwards at the Custom House, London," mean that the freight is to be paid on the unloading and right delivery of the cargo to the consignee in cash, but that if the cargo is delivered before the expiration of two months from the vessel's report inwards at the Custom House, London, a discount is to be deducted so as to make the amount paid equal to cash at two months from the date of the vessel's report inwards at the Custom House, London; and that by the said usage the shipowner has, under charter-parties worded in the same manner as the said charter-party, a lien on the cargo for the freight to be paid according to the terms of such charter-parties.

Sixth plea.—The defendant repeats all the averments in the fourth plea, except that the plaintiffs constitute the firm of C. Shand & Co. of Madras: that the plaintiffs act in London as the agents of C. Shand & Co. of Madras, and that they took up and paid the said bill of exchange, as the agents of the said firm of C. Shand & Co., at their request and for their honour, and with full notice of the terms of the charter party.

Seventh plea.—The defendant repeats the averments in the fifth plea, except the averment that the plaintiffs constitute the firm of C. Shand & Co. of Madras: that the plaintiffs act as agents in London of C. Shand & Co., and took up and paid the said bill of exchange as the agents of C. Shand & Co., and at their request and for their honour, and with full notice of the terms of the charter-party.

Demurrer and joinder.

1859.  
SHAND  
v.  
SANDERSON.

1859.  
—  
SHAND  
v.  
SANDERSON.

*Blackburn*, in support of the demurrer.—By the charter-party between the defendant and Hicks, the captain was empowered to sign bills of lading at any rate of freight. Then comes a clause which would give no lien even as against Hicks. But it is alleged that there is a lien by custom against Hicks; and the first question is whether there is a lien against the plaintiffs, because C. Shand & Co. of Madras are identified with Hicks. Assuming that there is a lien against Hicks, there is none against C. Shand & Co. C. Shand & Co. purchased sugars for which they have not been paid. They drew bills for the price, took a bill of lading in their own names, and indorsed the bills of exchange and the bill of lading to the Oriental Bank. *Foster v. Colby (a)* shews that as against the bank the defendants would have had no lien. Why should C. Shand & Co. be in a less favorable position? They had purchased sugars which had never vested in the charterers; they therefore stood in the same position as the plaintiff in *Foster v. Colby (a)*. There is nothing in the charter-party to prevent the charterer's agents from entering into the contract contained in the bill of lading. The object of the clause providing that the captain may sign bills of lading at any rate of freight is to enable the captain to bargain with any persons for a smaller rate of freight than that mentioned in the charter-party. If the charterer himself makes two contracts, one for a larger and the other for a smaller rate of freight, he may be bound to pay the larger rate. But if the contract by bill of lading is with a third person, it makes no difference that the shipper has notice of the charter-party, where it empowers the master to sign bills of lading at any rate of freight. In the cases which will be cited on the other side the charterer was the shipper, and as he was

(a) 3 H. & N. 705.

party to two contracts, as against him the larger obligation would be binding. As to the fourth and sixth pleas, there was no lien by the charter-party even as against Hicks. That seems to be settled by the case of *Alsager v. The St. Katharine's Dock Company* (a). As to the fifth and seventh pleas, the custom as to lien is only stated to have existed in England, and is not shewn to have been known to the shippers at Madras.—On this point he referred to *Kirchner v. Venus* (b).

1859.  
  
 SHAND  
 v.  
 SANDERSON.

*Mellish* (with whom was *Kemplay*), for the defendant.—In order to understand this case it is necessary to consider the position of C. Shand & Co. The captain was to sign bills of lading “without prejudice to the charter-party.” C. Shand & Co., the agents of the charterer, received orders from the charterer to ship sugars and to draw for the price, and shipped the sugars accordingly. They shipped under the charterer's orders, and in the character of agents of the charterer required the captain to sign the bill of lading. Now in *Foster v. Colby* (c) and *Gilkison v. Middleton* (d) it was decided that where the charterer's agent has procured bills of lading to be signed, and has indorsed them for value, the shipowner is bound to deliver the goods to the indorsee of the bill of lading on payment of the bill of lading freight. The power to sign bills of lading at any rate of freight is given to enable the shipper to raise money on the bills of lading from third persons. The plaintiffs, however, merely stand in the position of charterers' agents. [*Martin, B.*—The goods belonged to C. Shand & Co.; they never parted with the possession of them, and in fact were holding adversely to the

(a) 14 M. &amp; W. 794.

(c) 3 H. &amp; N. 705.

(b) Privy Council, March 16,

(d) 2 C. B., N. S. 184.

1859.  
  
 SHAND  
 v.  
 SANDERSON.

charterer: *Turner v. The Trustees of the Liverpool Docks*(a)] The bills of lading were to be "without prejudice to the charter-party." [*Martin, B.*—That means without prejudice to the rights of the shipowner against Hicks.] "Without prejudice" means without prejudice to any right of lien. C. Shand & Co. having had notice of the charter-party, the principle of *Faith v. The East India Company*(b) applies. In *Gledstanes v. Allen* (c) the charterers shipped goods of their own, for which the captain signed bills of lading at a specified rate of freight. *Jervis, C. J.*, said: "So long as the goods remain the property of the charterers, or of their agent, they are liable to the lump freight. And I do not think the clause at the end of the charter-party, authorizing the master to sign bills of lading, at any rate of freight without prejudice to this charter-party, makes any difference." That case was decided upon the authority of *Small v. Moates* (d). The case of *Alsager v. The St. Katharine's Dock Company* was cited to shew that there is no lien under the charter-party. There is a difference between the charter-party in the present case and that in the case cited. The expression "freight to be paid in cash at two months from the date of the report" is merely a short expression to signify that the freight is to be paid in cash *equal to cash at two months*, that is, the freight is to be paid on the unloading and right delivery of the cargo in cash.

*Blackburn* was not called on to reply.

POLLOCK, C. B.—The plaintiffs are entitled to judgment. The claim is to have the goods delivered without reference to a lien which might have existed under the charter-party had it not been for the bill of lading. The

(a) 6 Exch. 543.

(b) 4 B. & Ald. 630.

(c) 12 C. B. 202. 220.

(d) 9 Bing. 574.

defendant says the plaintiff was aware of the charter-party. But there is a distinction between this case and *Faith v. The East India Company* (a). In that case there was fraud; here none is found, and we cannot infer it. Then, what is the meaning of the expression "without prejudice to this charter-party?" It means, not that a right of lien must be presumed, but that the charter-party is not to be considered as waived, and that all rights created by it are to exist as a matter of contract, though they do not attach on the goods by way of lien.

1859.  
  
 SHAND  
 v.  
 SANDERSON.

MARTIN, B.—I am of the same opinion. If the goods were Hicks's, Mr. *Mellish's* argument would be conclusive to shew that the right of the shipowner would be regulated by the charter-party; that is, assuming the payment "at two months" to be out of the question, he would have had a right to hold the goods till the charter-party freight had been paid. The provision in the charter-party, that the captain is to sign bills of lading "at any rate of freight without prejudice to the charter-party," means that if the captain sign bills of lading at a lower rate of freight, that shall not affect the right of the shipowner to recover the sum really due to him. Here C. Shand & Co. were agents of Hicks, the charterer, and bought goods, intending them for him, but declined to deliver, or transfer the possession of them, until they should have been reimbursed the cost price. The question is whether, as between themselves and the shipowner, they had a right to make a bargain that the goods should be carried for less than the charter-party freight. I think they had. They were in the same position as any third party would have been. The possession of the goods by C. Shand & Co. was, as it were, adverse to Hicks. The bargain made by them was made as

(a) 4 B. & Ald. 630.

1859.  
  
 SHAND  
 v.  
 SANDERSON.

third persons for their own advantage, and I think that they were not bound, as agents for Hicks, to sacrifice their own position as being in possession of goods which they had paid for. There was nothing fraudulent in calling on the captain to sign the bills of lading for less than the charter-party freight. It may be that the property in the goods had vested in Hicks; but C. Shand & Co. had a right to protect themselves as they have done.

BRAMWELL, B.—I am of the same opinion. The case is concluded by *Foster v. Colby (a)*. C. Shand & Co. had goods which they might have shipped or not; the captain might have taken the goods on board or refused them; if he was bound to take them the case is the stronger against the defendant. But, assuming that he had an option, he elected to take them on certain terms, and it is now contended that he was not bound by those terms. That cannot be the law. It would be contrary to convenience and common sense. If the goods had been shipped by Hicks himself, and the bill of lading had been indorsed to the present plaintiffs, I think the same principles would have applied. It cannot be said that as it is so irrational to put the shipowner's agent in such a position, that the parties cannot be supposed to have meant what they say.

CHANNELL, B.—The case is decided by *Foster v. Colby (a)*. There is no substantial distinction between that case and the present.

Judgment for the plaintiffs.

(a) 3 H. & N. 706.

1859.

SNODIN *v.* BOYCE.

May 12.

**D**ECLARATION for goods sold and delivered, money paid, &c.

Plea.—That before and at the time of the making of the deed hereinafter mentioned, and for six calendar months and upwards next immediately before the suspension of payment hereinafter mentioned, the defendant was a trader liable to become bankrupt within the meaning of the statutes in force concerning bankrupts, and resided and carried on business within the jurisdiction of the London District Court of Bankruptcy; and that, before and at the time of making of the said deed, the defendant was indebted to divers persons in divers sums of money, and was then unable to pay the same in full; and the defendant, before the making of the said deed, and after the passing and coming into effect of the Bankrupt Law Consolidation Act, 1849, to wit, on the 19th May, 1858, as such trader, suspended payment, and afterwards, by deed of arrangement, made after the passing and coming into effect of the said last mentioned Act, to wit, on the 1st June, 1858, between the defendant of the first part, W. P. Isaacson, R. B. Whiteside, J. D. Farmer and W. Denton of the second part; and the several other persons whose names and seals should be thereunto set, being creditors of the defendant, of the third part; after reciting (amongst other things) that it had been agreed that his estate and effects and assets should be wound up, liquidated and administered as therein and herein mentioned: It was witnessed that the defendant covenanted with the parties thereto of the second part, and each of them, that

A deed of arrangement under the 224th section of the Bankrupt Law Consolidation Act, 1849, which provides for the distribution of the debtor's estate in the same manner "as if he had become bankrupt" on a certain day, is void; since a deed of arrangement must provide for the distribution of *all* the debtor's estate, but a bankrupt is entitled to retain certain excepted articles: Per *Martin, B., Watson, B., and Channell, B.*: *Pollock, C. B., dissentiente.*

1859.

SNODIN  
v.  
BOYCE.

he, the defendant, would carry on or wind up his business in such manner as the said parties of the second part should direct or approve, and would, during the continuance of that arrangement, conduct to a conclusion the liquidation of all the business and affairs in which he was then interested for the benefit of his said creditors, and would use his best and utmost endeavours, in accordance with any directions as aforesaid, to sell and convert into money, and collect and get in and receive, recover and liquidate, all such personal estate, debts, monies, goods and effects, and other interests or assets belonging or owing to, or to become due, owing or to belong to him, as would vest in or become subject to the disposition, management, control or administration of the Commissioners in bankruptcy, or of his assignees in bankruptcy, if he had become bankrupt on the said 19th day of May then last past, and obtained his certificate of conformity on the day of the date of these presents; and it was by the said deed further agreed and declared that the estate and effects of the defendant should be administered under the inspectorship of the parties thereto of the second part, and the said monies and assets should be payable and distributable to and amongst, and for the benefit of, the creditors of the defendant, in such and the same manner as the same would be payable and distributable as if he had been adjudicated bankrupt on the said 19th day of May then last past, and as if the respective debts of the creditors, parties thereto, had been debts duly proved under the said bankruptcy on the said 19th day of May, so as not to prejudice any securities of any creditor; and it was by the said deed further agreed and declared that if, at any time before the final settlement and liquidation of the defendant's affairs, a majority in value of the creditors, parties thereto, whose debts should not have been

fully satisfied, should so require, the defendant should assign to such persons as should be named, in trust for the benefit of the creditors of the defendant, according to the provisions therein contained, such part of the estate, effects and assets thereby covenanted to be liquidated and distributed, as should then remain undistributed, in trust to sell, dispose and convert the same into money, and to receive the same, and to apply the produce thereof for the benefit of the creditors of the defendant in a just proportion, according to the provisions of those presents, without any preference or priority, and in full satisfaction thereof, rendering the surplus (if any) after full satisfaction of the said debts and the expenses of the trust, to the defendant, and immediately upon and simultaneously with the execution of such deed or deeds of assignment, the defendant should, by force of those presents alone, be released and discharged from all claims and demands by his said creditors on account or in respect of the debts due to such creditors, or otherwise in respect of the premises, and these presents might be pleaded as a release accordingly. Provided always, and it was further agreed and declared by the said deed, that in case the said inspectors should at any time before a certain day certify that there had been default in the observance or performance of the covenants therein contained on the part of the defendant, or that a sufficient proportion of the defendant's creditors had not executed those presents, or a duplicate thereof, or a deed of similar effect, then that the said deed, except as to all things theretofore made or done in pursuance thereof, should be void. And it was further witnessed by the said deed that the parties thereto of the third part did each of them covenant with the defendant that immediately after those presents should be discharged from the said last mentioned

1859.

SNODIN

v.

BOYCE.

1859.  
SNODIN  
v.  
BOYCE.

proviso for making them void, or after the inspectors should certify that the said liquidation had proceeded sufficiently, and such an assignment (if any) as should be required, as heretofore mentioned, should have been made, then immediately and simultaneously with either of the said cases happening, they, the creditors, parties thereto, would release and discharge the defendant from all and all manner of actions, suits, claims and demands whatsoever, for or by means or on account of all and every or any of the debts due to them, the said creditors; and that in either of the cases aforesaid that covenant might, without the execution of any deed or instrument of release, be pleaded and given in evidence against the said creditors, or any of them, as an actual release. And, further, that unless and until those presents should become void by virtue of the proviso hereinbefore mentioned and set forth, they, the said creditors, parties thereto, would not sue, or commence, or prosecute any action or suit against the defendant, for or on account of the whole or any part of the debt or debts then due and owing by the defendant to the said creditors, parties thereto, or any of them; and in case they, the said creditors, or any or either of them, should in any respect fail to observe that covenant, then and in such case, and immediately thereupon, the debt of the creditor by whom such covenant should fail to be observed should become absolutely forfeited or extinguished, and altogether irrecoverable in law or equity; and such creditor should thenceforth cease to be entitled to any claim or demand in respect thereof, either by virtue of those presents or otherwise; and that covenant should accordingly operate and enure and might be pleaded in bar as a good and effectual release and discharge of such debt. And the defendant says that no person became a creditor, nor were there any personal earnings

of him, the defendant, between the said 19th May, 1858, and the day of the date of the said deed; that he had not then any real estate, and that the said deed provided for the distribution of all his estate and effects among all his creditors; and that the said deed was duly signed and executed by him, the defendant, and six-sevenths of his creditors in number and value, within the meaning of the said statute, as was duly certified by the said inspectors; and that the said deed did not become void, and that an assignment was duly made of the defendant's estate and effects to trustees for distribution amongst all his creditors, in conformity with the said deed; and that in the said deed it was stated to be, and it was and is, an arrangement by deed, and a deed of arrangement between the defendant and his creditors, within the meaning of the said statute; and that the said deed and assignment always have been, and still are, respectively in force, and that the defendant has continually hitherto observed and performed and fulfilled the same, and that all things have been done and happened and existed to entitle him to the benefit thereof. And the defendant further says that the plaintiff, at the time of the making of the said deed, was a creditor of the defendant in respect of the causes of action in the declaration mentioned within the meaning of the said statute, and that the debts in the declaration mentioned were debts due from the defendant to the plaintiff within the meaning of the said deed, and in respect of which the plaintiff was entitled to receive payment according to the said deed; and that after the suspension of payment by the defendant and the making of the said deed the plaintiff had due notice thereof respectively, and was requested to execute the said deed, and might and could have executed the same if he would. And the defendant further says that after the commencement of this suit, and within three months from the plaintiff having

1859.

SNODIN

v.  
BOYCE.

1859.

SNODIN  
v.  
BOYCE.

such notice as last aforesaid of the defendant's said suspension of payment and of the making of the said deed, to wit, on the 16th day of July, 1858, the said London District Court of Bankruptcy, upon the petition of the defendant, being such trader as aforesaid, duly certified that the said deed of arrangement was duly signed by and on behalf of such majority of the defendant's creditors as is required by the said statute, the plaintiff having had (and the defendant avers that he had) fourteen days' notice of the intended application for the said last mentioned certificate, whereby and by reason of the premises, and by force of the statute in that behalf, the said deed of arrangement then became and was, and is, binding and obligatory on the plaintiff, and the defendant has been and is released and discharged from the causes of action in the declaration mentioned.

Demurrer and joinder therein.

*Aspland* argued in support of the demurrer in last Hilary Term (Jan. 17) (a).—The plea is bad on several grounds. First, the deed, which is a deed of arrangement under the 224th section of the 12 & 13 Vict. c. 106, does not provide for the distribution of all the defendant's estate amongst all his creditors. The estate is distributable in the same manner as if the defendant had been adjudicated bankrupt on the 19th May last. But in the case of bankruptcy the defendant would be entitled to retain, for the use of himself and his family, under the name of excepted articles, such articles of household furniture, and tools, implements of trade and other like necessities as he should specify and select, not exceeding in the whole the value of 20*l*.: 17 & 18 Vict. c. 119, s. 25. *March v. Warwick* (b) de-

(a) Before *Pollock*, C. B., *Martin*, B., *Watson*, B., and *Channell*, B.

(b) 1 H. & N. 158.

cided that a deed of arrangement which excepts from the assignment the wearing apparel of the debtor and his family is void. *Cooper v. Thornton* (a) and *Bloomer v. Darke* (b) are also authorities that a deed of arrangement must provide for the entire distribution of the trader's estate. Besides, this deed does not provide for the distribution of the defendant's real estate, or of his personal earnings, between the 19th May and the date of the deed. The averment in the plea that he had no real estate and that he earned nothing during that period, does not remove this objection. The deed ought to be good on the face of it at the time it is intended for execution, and the plaintiff might lawfully refuse to execute such a deed. Again, the estate is not distributable amongst all the creditors but those only who execute the deed. In *Larpent v. Bibby* (c) *Parke, B.*, expressed a strong opinion that such a deed is void. Secondly, the deed contains a covenant by the defendant with his trustees that he will carry on his business for the benefit of his creditors. The effect of this covenant is to render, not only those creditors who execute the deed, but also the non-executing creditors, partners in the business. *Owen v. Body* (d) shews that a deed which contains such a stipulation is not valid against the creditors who do not execute it. Thirdly, the deed provides that if, at any time before the liquidation of the defendant's affairs, a majority in value of the creditors, parties thereto, should so require, the defendant would assign the undistributed estate to trustees for the benefit of his creditors, and that immediately upon such assignment the defendant should be released from all claims. That is not binding on creditors who are not parties to the deed. A plea setting up such a deed

1859.

SNODIN  
v.  
BOYCE.

(a) 1 E. &amp; B. 544.

also *Taylor v. Pearse*, 2 H. & N.

(b) 2 C. B., N. S., 165.

36.

(c) 5 H. L. Cas. 481. See

(d) 5 A. &amp; E. 28.

1859.

SNODIN  
v.  
BOYCE.

must shew that it amounts to a release : *Tabor v. Edwards* (a). In *Macnaught v. Russell* (b) the deed contained a covenant that the creditors would not take any proceedings at law against the defendant ; but the Court held that valid because it was confined to the creditors who executed the deed.

*Thrupp*, in support of the plea.—With respect to the first objection, the language of this deed is substantially the same as in the cases of *Macnaught v. Russell* (b) and *Irving v. Gray* (c). The deed contemplates that all creditors will become parties either by their execution of it or by operation of law. In *March v. Warwick* (d) the deed, by its terms, expressly excepted the wearing apparel of the debtor and his family. In *Cooper v. Thornton* (e) the trustees to whom the debtor's estate was assigned were empowered to return him effects to the value of 20*l*. In *Bloomer v. Darke* (f) and *Tabor v. Edwards* (a), there was merely a general averment that all things were done to make the deed obligatory on the creditors. This plea avers that there was no real estate, and, if there had been, the language of the deed is sufficient to convey it. As to the objection that, by this deed, the creditors who have not executed it may be made partners in the defendant's business, the statute contemplates the trader's business being carried on for the benefit of his creditors.

*Aspland*, in reply, referred to *Ex parte Calvert* (g).

MARTIN, B., now said :—The judgment which I am about to deliver is that of my brothers *Watson* and *Channell*

(a) 4 C. B., N. S., 1.

(b) 1 H. & N. 611.

(c) 3 H. & N. 34.

(d) 1 H. & N. 158.

(e) 1 E. & B. 544.

(f) 2 C. B., N. S., 165.

(g) 27 L. J. Bank. 42.

and myself. The action was brought to recover a debt, and the defendant pleaded a deed of arrangement under the 224th section of the Bankrupt Law Consolidation Act, 1849. The deed is in a form which I have never seen before. It is not a conveyance of the trader's property, but it is a covenant by him with his trustees that he would collect, get in and receive, recover and liquidate all such personal estate, debts, monies, goods and effects, and other interests or assets belonging or owing to, or to become due, owing, or to belong to him as would vest in or become subject to the disposition, management, control or administration of the commissioners in bankruptcy, or of his assignees in bankruptcy, as if he had become bankrupt on the 19th of May then last. Therefore the deed is nothing more than a covenant by himself, confined to his personal estate and effects, which would vest in his assignees *if he had become bankrupt* on a certain day, and the objection which might arise on account of the omission to mention real estate, is supposed to be met by an averment that he had none. No doubt the clauses in the Act are very difficult of construction, but we think that this case is concluded by the decisions in the Court of Queen's Bench and in this Court. The case in this Court, *March v. Warwick* (a), decided that a deed of arrangement which excepts from the assignment the wearing apparel of the debtor and his family is void. The case in the Court of Queen's Bench, *Cooper v. Thornton* (b), decided that a deed which conveys the whole of the debtor's estate to trustees, but empowers them to give back to the debtor effects to the value of 20*l.* is also void. It seems to my brothers *Watson* and *Channell*, and myself, that these two cases taken together decide this case, for under a bankruptcy the necessary wearing

1859.

SNODIN  
v.  
BOYCE.

(a) 1 H. &amp; N. 158.

(b) 1 E. &amp; B. 544.

1859.

SNODIN  
v.  
BOYCE.

apparel of the bankrupt is reserved to him ; and, therefore, the covenant in this deed does not extend to that. If those cases are law, this deed is void. I myself think that there are several other objections to the deed, but it is not necessary to mention them. There will therefore be judgment for the plaintiffs.



POLLOCK, C. B.—I differ in opinion from the rest of the Court. The only difficulty I have had is on account of the general nature of the deed. It certainly is not an assignment—whether it is an arrangement under the statute is another question. The object of the statute was to give effect to certain deeds therein mentioned, some of which are deeds of inspection, where undoubtedly there is not an actual assignment, but power is given to certain inspectors to dispose of the property, which in reality has the effect of an assignment. It is difficult not to come to the conclusion that the statute meant to give effect to such deeds; and I do not discover anything in the Act which makes it necessary that the property should be actually assigned. With respect to the objection that here there is only a covenant to convey so much of the property as would pass under the bankrupt law, I beg to express my dissent. I do not propose to discuss the case, but briefly to state the reasons why I cannot assent to the view taken by the rest of the Court. The question turns upon the construction of the 12 & 13 Vict. c. 106, which is intituled “An Act to amend and consolidate the laws relating to bankrupts;” and there is then a re-enactment of all that belongs to the administration of the bankrupt law. There are clauses with respect to the Commissioners who are to administer the law, with respect to the registrars, the accountants, official assignees, fees, salaries, the building in which the court is to be held; and so it goes through the entire code

of bankrupt law. The matter immediately preceding the 224th section is "with respect to arrangements between debtors and their creditors under the superintendence and control of the Court;" and then the statute goes on "with respect to arrangements by deed," and I think that the legislature contemplated any species of arrangement whatever; that is, any arrangement by which the creditors may be satisfied without having recourse to the bankrupt law enacted in the former part of the statute. There is nothing in the 224th section which makes an actual assignment necessary; and it appears to me to apply to any arrangement, whether by deed of this description or by actual assignment, with which a certain number of the creditors would be satisfied. The objection made upon this head is that the arrangement is only in respect of so much of the property as would be distributed under the bankruptcy. Now, whatever may have been decided as to a power to retain or to give back a part of the property, I cannot assent to this,—that when in a statute providing for the distribution of a debtor's property according to certain rules in bankruptcy we find facilities given for arrangement without recourse to the bankrupt law, we should hold that arrangement bad which, in the distribution and division of the property, follows the very law to which these provisions for arrangement are appended in the statute in which we find this mode of doing without the bankrupt law. This arrangement is made in the pure spirit of the bankrupt law, to divide all that a bankruptcy would divide; and I cannot think that when the act of parliament intended that arrangements should have effect given to them, a deed of this kind, which professes to follow the very result of the bankruptcy code, is, in point of law, void. I am sorry to differ from the rest of the Court; but I cannot come to this conclusion that what the statute says in the former part

1859.

SNODIN  
v.  
BOYCE.

1859.

SNODIN

v.

BOYCE.

of it should become wrong when carried out by deed of arrangement or inspection. For these reasons I am not prepared to say this deed is void.

Judgment for the plaintiff.

May 5.

ELIZABETH LANGTON v. HIGGINS.

In January, 1858, C. agreed to sell to the plaintiff all the crop of oil of peppermint grown on his farm in that year at 21s. per pound. In September C. wrote to the plaintiff for bottles to put the oil in. The plaintiff sent the bottles, and C. having weighed the oil put it in the plaintiff's bottles, labelled them with the weight, and made out invoices. Before, however, he had completed the filling of the bottles he sold and delivered several of them to the defendant. The plaintiff had for many years past bought of C. his crop of oil of peppermint, and it was usual for C., when the bottles were filled, to deliver them to a carrier to take to a railway station. In detinue, by the plaintiff against the defendant, for the bottles of oil of peppermint delivered to him:—*Held*, that the putting the oil in the plaintiff's bottles was an act of appropriation which vested the property in the plaintiff.

THE first count of the declaration was in detinue for cases and bottles of oil of peppermint. The second count was in trover for the same goods.

Pleas.—First: not guilty. Secondly: that the goods were not, nor were any or either of them, the plaintiff's as alleged.

At the trial, before *Martin*, B., at the London sittings after last Hilary Term, the following facts appeared:—The plaintiff was a wholesale druggist in London, and the defendant was a wholesale druggist at Liverpool. For many years past the plaintiff had been in the habit of contracting with one Carter, a farmer at Leverington in Cambridgeshire, for the purchase of all the oil of peppermint to be distilled from the crop of peppermint which might be grown on his farm in that year. The contracts were made in the early part of the year, and Carter obtained from the plaintiff advances in respect of them. On the 27th January, 1858, the plaintiff and Carter entered into the following agreement:—

“London, Jan. 27th, 1858.

“The undersigned, Frederick Carter of Leverington,

agrees to sell to Messrs. William Langton & Co., of London, the whole of his crop of oil of peppermint grown in the year 1858, at the rate of 21s. per lb.

1859.  
LANGTON  
v.  
HIGGINS.

“But should the said crop amount to 250 bottles of oil, he agrees to deduct 6d. per lb. from the said 21s. and above that quantity 1s. per lb., provided the Messrs. Langton find the said 21s. per lb. is more than they can reasonably afford.

“This agreement is made upon the condition that Messrs. Langton & Co. advance the said Frederick Carter 1000l. on account of the above named crop, and pay the amount due at the time of delivery by two, four and six months bills.

“Fred. Carter.”

Previously to this agreement advances had been made by the plaintiff to Carter to the extent of 310l., and on the day the agreement was signed Carter gave to the plaintiff a bill of sale of his live and dead stock, crop of oil of peppermint, crops of corn, furniture, &c., as a security for the 310l. and further advances to the extent of 1000l. It was usual for the plaintiff to send to Carter bottles to be filled with the oil of peppermint, and, in September, Carter applied for the bottles and some gut-skin to cover them. The plaintiff accordingly sent him two gross of bottles with gut-skin. On the 8th of October, Carter wrote to the plaintiff, “We shall lose no time in getting the oil off.” It was the business of Mrs. Carter to put the oil of peppermint in the bottles, which, as on previous occasions, she did in the following manner.—She first weighed the empty bottles and then filled them with the oil. She then weighed them again, having previously marked the tare and weight of each bottle on a piece of paper pasted on it. She then marked the gross weight of the oil and the bottle, and added them together on the same paper. She then

1859.  
LANGTON  
v.  
HIGGINS.

subtracted the tare and placed the net weight and the number of the bottle upon the paper and laid the bottle aside. After the bottles were filled, by Carter's direction, she made out invoices and address cards, which she placed in Carter's desk. She was engaged in these operations about nine days, and finished on the 29th of September. On all previous occasions, the bottles, when filled, were placed in cases and delivered to a carrier to take to the railway station, to be forwarded to the plaintiff in London. Carter left his home on the 15th of October and has not since been heard of. The defendant purchased of Carter fifteen cases of the oil of peppermint, nine of which were delivered to him at Liverpool on the 16th of September, and the others on the 23rd.

It was submitted on behalf of the defendant that under these circumstances the property in the oil of peppermint did not vest in the plaintiff. The learned Judge directed a verdict for the plaintiff for 626*l.* 15*s.*, reserving leave to the defendant to move to enter a nonsuit, or to reduce the amount to the value of the bottles.

*Edward James*, in the present Term, obtained a rule nisi accordingly; against which

*Atherton* and *Quain* shewed cause.—The property in the oil of peppermint vested in the plaintiff by the agreement of the 27th January, 1858. That is an absolute sale to him of all the oil of peppermint grown on the vendor's farm in that year. It will perhaps be argued that, as the agreement was made in January, and according to the ordinary course of events the oil of peppermint would not be in existence until the September following, no property in the particular commodity passed by that contract. But, at all events, what was done in September, coupled with the agreement, was sufficient to pass the property. At the

vendor's request the plaintiff sent his bottles which were filled with the oil of peppermint, and invoices were made out to him. That is a sufficient appropriation. In *Aldridge v. Johnson* (a) the plaintiff agreed with K. to purchase of him 100 out of 200 quarters of barley, which the plaintiff had seen in bulk and approved of, and he paid part of the price. It was agreed that the plaintiff should send sacks for the barley, and that K. should fill the sacks with the barley, take them to a railway, place them upon trucks there free of charge and send them to the plaintiff. The plaintiff sent sacks enough for a part only of the 100 quarters: those K. filled, and he also endeavoured to find trucks for them, but was unable to do so. The plaintiff repeatedly sent to K. demanding the barley. K. finally detained it, and emptied the barley from the sacks into the bulk. It was held by Lord *Campbell*, C. J., *Coleridge*, J., and *Erle*, J., that the portion of the barley put into the sacks passed to the plaintiff. So here, the property passed when the oil of peppermint was put into the plaintiff's bottles. If the assent of the plaintiff was necessary, there is sufficient evidence of it. This is not like the case of a purchase of something not then in esse, and which must conform to a certain description. In such case there is reason for requiring the approval of the purchaser in order to vest the property in him, for otherwise he might be bound to pay for an article which did not correspond with his order. Here there was a sale to the plaintiff of the whole crop of oil of peppermint grown on the particular farm, and the moment it was obtained he was bound to accept it, whatever might be its quality. The result of the authorities is that, in the case of a sale of unascertained goods, the property passes immediately they are ascertained and appropriated: Chitty on Contracts, p. 342, 6th ed.—

(a) 7 E. &amp; B. 885.

1859.  
LANGTON  
v.  
HIGGINS.

1859.  
SNODIN  
v.  
BOYCE.

proviso for making them void, or after the inspectors should certify that the said liquidation had proceeded sufficiently, and such an assignment (if any) as should be required, as heretofore mentioned, should have been made, then immediately and simultaneously with either of the said cases happening, they, the creditors, parties thereto, would release and discharge the defendant from all and all manner of actions, suits, claims and demands whatsoever, for or by means or on account of all and every or any of the debts due to them, the said creditors; and that in either of the cases aforesaid that covenant might, without the execution of any deed or instrument of release, be pleaded and given in evidence against the said creditors, or any of them, as an actual release. And, further, that unless and until those presents should become void by virtue of the proviso hereinbefore mentioned and set forth, they, the said creditors, parties thereto, would not sue, or commence, or prosecute any action or suit against the defendant, for or on account of the whole or any part of the debt or debts then due and owing by the defendant to the said creditors, parties thereto, or any of them; and in case they, the said creditors, or any or either of them, should in any respect fail to observe that covenant, then and in such case, and immediately thereupon, the debt of the creditor by whom such covenant should fail to be observed should become absolutely forfeited or extinguished, and altogether irrecoverable in law or equity; and such creditor should thenceforth cease to be entitled to any claim or demand in respect thereof, either by virtue of those presents or otherwise; and that covenant should accordingly operate and enure and might be pleaded in bar as a good and effectual release and discharge of such debt. And the defendant says that no person became a creditor, nor were there any personal earnings

of him, the defendant, between the said 19th May, 1858, and the day of the date of the said deed; that he had not then any real estate, and that the said deed provided for the distribution of all his estate and effects among all his creditors; and that the said deed was duly signed and executed by him, the defendant, and six-sevenths of his creditors in number and value, within the meaning of the said statute, as was duly certified by the said inspectors; and that the said deed did not become void, and that an assignment was duly made of the defendant's estate and effects to trustees for distribution amongst all his creditors, in conformity with the said deed; and that in the said deed it was stated to be, and it was and is, an arrangement by deed, and a deed of arrangement between the defendant and his creditors, within the meaning of the said statute; and that the said deed and assignment always have been, and still are, respectively in force, and that the defendant has continually hitherto observed and performed and fulfilled the same, and that all things have been done and happened and existed to entitle him to the benefit thereof. And the defendant further says that the plaintiff, at the time of the making of the said deed, was a creditor of the defendant in respect of the causes of action in the declaration mentioned within the meaning of the said statute, and that the debts in the declaration mentioned were debts due from the defendant to the plaintiff within the meaning of the said deed, and in respect of which the plaintiff was entitled to receive payment according to the said deed; and that after the suspension of payment by the defendant and the making of the said deed the plaintiff had due notice thereof respectively, and was requested to execute the said deed, and might and could have executed the same if he would. And the defendant further says that after the commencement of this suit, and within three months from the plaintiff having

1859.

SNODIN

v.

BOYCE.

1859.  
LANGTON  
v.  
HIGGINS.

what Mrs. Carter did was the act of Carter, and I am of opinion that the putting the oil of peppermint into the bottles was the same thing as delivering it to the plaintiff.

MARTIN, B.—I am of the same opinion. Taking the language of the judgment in *Aldridge v. Johnson* to have been as reported in Ellis and Blackburn, viz., that the contract was complete so as to vest the property in the plaintiff as soon as the barley was put into the sacks, I think that case was rightly decided. It seems to me that the law on this subject is correctly laid down in the case of *Logan v. Le Mesurier (a)*. The defendant's counsel chiefly founded their argument upon the obligation of the vendor to deliver the goods to the carrier to convey them to the railway station. If they had established that, it might have altered the case, but they have failed to do so. In my opinion, when two parties enter into a contract and put it into writing, that writing determines the terms of their bargain; and they cannot add to it by shewing that at the time the contract was made, they had been accustomed to do something further, still less by shewing that something further was usually done by the vendor. However, I found my judgment on one of the most useful rules in the law, viz., that when parties have put their contract into writing, that writing determines what the bargain is. Here there is a contract by which the party signing it agrees to sell to the plaintiff the whole of his crop of oil of peppermint grown in the year 1858, at the rate of 21s. per pound. In my judgment, when that crop was weighed and placed in the bottles of the plaintiff, the property vested in her. The rule of law is, that where the article corresponds with that agreed to be sold, and everything which

(a) 6 Moore P. C. 116.

is to be done by the vendor, is done by him, the property passes to the vendee and he is liable for the price. That will be found in Shep. Touch. p. 224, 225.

1859.  
  
 LANGTON  
 v.  
 HIGGINS.

BRAMWELL, B.—I am also of opinion that the rule ought to be discharged. The contract is to sell the whole of the vendor's crop of oil of peppermint grown in a certain year. I do not think that when the oil was made the property passed,—possibly there may have been an obligatio certi corporis; but it appears to me that when the oil was put into the plaintiff's bottles the property in it vested in her. I do not dissent from what was said by my brother *Martin* with respect to the delivery to a carrier. It may be that the vendor would be bound to shew some act of delivery before he could sue for the price; but however that may be, I am of opinion that the property vested in the plaintiff when the oil was put into her bottles. Looking at the principle, there ought to be no doubt. A person agrees to buy a certain article, and sends his bottles to the seller to put the article into. The seller puts the article into the buyer's bottles, then is there any rule to say that the property does not pass? The buyer in effect says, "I will trust you to deliver into my bottles, and by that means to appropriate to me, the article which I have bought of you." On the other hand the seller must be taken to say, "You have sent your bottles and I will put the article in them for you." In all reason, when a vendee sends his ship, or cart, or cask, or bottle to the vendor, and he puts the article sold into it, that is a delivery to the vendee. If we could suppose the case of a metal vessel filled with a commodity which rendered the vessel useless for subsequent purposes, it would be monstrous if the vendor could say "I have destroyed your vessel by putting into it the article you purchased, but still the property in the article never passed

1859.  
 ~~~~~  
 LANGTON  
 v.  
 HIGGINS.

to you." Or suppose a vendor was to deliver a ton of coals into the vendee's cellar, could he say "I have put the coals in your cellar, but I have a right to take them away again?" But, independently of reason, there is an authority on the subject. In *Blackburn on Contracts*, it is said that the property does not pass unless there is an intention to pass it, and various cases are cited in support of that position. It is then said, p. 151, that two rules have been laid down on the subject. The first is, "that where by the agreement the vendor is to do anything to the goods, for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or as it is sometimes worded, into a deliverable state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property." The second rule is, "that where anything remains to be done to the goods for the purpose of ascertaining the price as by weighing, measuring or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of those things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted." That is not only good law but good sense. Then, can there be more complete evidence of intention to pass the property than when the vendee sends her bottles to be filled with the article purchased, and the vendor puts it into the bottles? Therefore, both upon principle and authority, I think that the property in the oil passed to the plaintiff when it was put into the bottles. The case of *Aldridge v. Johnson* (a) is precisely in point. Lord Campbell, C. J., there said:—"Looking to all that was done when the bankrupt (the vendor) put the barley in the sacks,

(a) 7 E. & B. 885.

*eo instanti* the property in each sack full passed to the plaintiff." It is true that in the Law Journal, *Erle*, J., is reported to have said that the outward act indicating the vendor's intention, was by filling the sacks "and directing them to be sent to the railway." But *Crompton*, J., who doubted upon another point, said, that "when the barley was put into the sacks, it was just as if it had been sent by a carrier." Therefore there is not only reason and general authority, but also the case of *Aldridge v. Johnson*, to warrant our judgment. The only difficulty I had was this—Suppose the oil of peppermint had been badly manufactured, I am not prepared to assent to the argument that the plaintiff would not have had a power of rejection. Again, suppose only a portion of the oil had been put into the bottles, inasmuch as the plaintiff was not bound to take a part only, would the property vest? *Aldridge v. Johnson* is an authority on that point. It may be that the plaintiff would have the option of refusing to take a part only of the oil or of accepting it, but that right is not inconsistent with the property vesting at his election. It might vest in him conclusively, but at all events it would vest when he exercised his option. For these reasons, I think that the rule ought to be discharged.

1859.  
LANGTON  
v.  
HIGGINS.

Rule discharged.

---

1859.

May 5.

CARTER v. CRICK.

The plaintiff, having heard that the defendant had some barley to sell, went to his counting-house, when his agent produced a sample which he said was "seed barley," offered to the defendant at 39s., and if the plaintiff would take it at 40s. he might have it. The plaintiff looked at the barley and said it was a good sample of seed barley, and agreed to buy it. At the plaintiff's request the defendant wrote to the person who had offered it to him, saying that he would accept it, and asking what sort it was as it would do well for seed. The plaintiff afterwards sold it under a warranty in writing as "Chevalier seed barley."

It turned out that it was "barley bigg," a species of barley unfit for malting purposes; and the person to whom the plaintiff had sold it recovered damages against him for the breach of warranty.—*Held*:—First, that there was no warranty by the defendant that the barley was "seed barley." Secondly, that the contract was satisfied by the delivery of barley fit for sowing; and that if the term "seed barley" meant barley fit for malting purposes, that ought to be shown by clear and irresistible evidence.

THE first count of the declaration stated that the defendant, by warranting 66 quarters of barley to be then seed barley, sold the same to the plaintiff at and for a certain price, to wit 40s. per quarter, which the plaintiff paid him. Yet the said barley was not then seed barley.—The count then stated that the plaintiff, without notice or knowledge of the said breach of warranty, and believing the barley to be seed barley, resold the same with a warranty that it was seed barley, and the purchaser sued him for such breach of warranty and recovered damages against him.—The second count stated that the plaintiff bargained and contracted with the defendant to buy of him, and the defendant bargained and contracted with the plaintiff to sell and deliver to him, 66 quarters of seed barley for a certain price per quarter, and the plaintiff then paid the defendant the said price, and was always ready and willing to accept and receive, and did and performed all things &c. to entitle him to have the said seed barley delivered to him. Yet the defendant never delivered the 66 quarters of seed barley, but delivered to him 66 quarters of barley which was not seed barley as and for the seed barley so bargained and contracted for as aforesaid.—The count then stated, as in the first count, that the plaintiff resold the same under a warranty.

Pleas.—To first count: that the defendant did not war-

rant as alleged. To second count: first, that the defendant did not promise as alleged; secondly, that there was no such breach of promise as alleged.—Issues thereon.

1859.  
 CARTER  
 v.  
 CRICK.

At the trial, before *Pollock*, C. B., at the London sittings after last Hilary Term, it appeared that the plaintiff was a corn merchant in Huntingdon, and the defendant a corn merchant in Cambridge. In January, 1857, the plaintiff, hearing that the defendant had some barley to sell, went to the defendant's counting house, when one Cossins, who managed the defendant's business, shewed the plaintiff a sample of barley, which he said was seed barley, and that it was offered to the defendant at 39s. a quarter, and if the plaintiff would take it at 40s. he might have it. The plaintiff looked at the barley, and said it was a good sample of seed barley, and agreed to buy it at 40s. per quarter. At the plaintiff's request, Cossins wrote to the person who offered to sell the barley to the defendant the following letter:—

“ Cambridge, 13th Jan. 1857.

“ Mr. Warren.

“ Sir—I will accept the 50 quarters barley as offered at 39s. per quarter. Please send me fresh sample of it to Cambridge Station. Shall be glad if you can let me know what sort it is, as it will do well for seed. Please put it on to the Lynn Station on Friday or Saturday, and let me know the quantity.

“ Yours respectfully,

“ Signed for C. Crick,

“ H. D. Cossins.”

The plaintiff afterwards sold the barley to one Raper, with a written warranty that it was “Chevalier seed barley.” It turned out that the barley was what is called “barley bigg,” and Raper recovered damages against the plaintiff for a breach of warranty. There was evidence that “barley

1859.  
 ~~~~~  
 CARTER  
 v.  
 CRICK.

bigg" was of no use for malting purposes, but that if sown on uplands it would produce good malting barley. Several witnesses stated that "seed barley" meant nothing more than a barley which would yield seed.

It was contended on the part of the plaintiff that "seed barley" implied such a description of barley as when sown would produce a crop of barley available for malting purposes. The defendant contended that "seed barley" implied no more than that the barley when sown would produce a crop. The learned Judge was of opinion that there was no evidence that seed barley meant any particular kind of barley, and nonsuited the plaintiff.

*Hawkins*, in the present Term, obtained a rule nisi to set aside the nonsuit, and for a new trial.

*Macaulay* and *Keane* shewed cause.—There was no warranty. The defendant's agent produced a sample of barley which he said was seed barley, and the plaintiff also thought it was seed barley. The letter of the 13th January, 1857, only amounts to this: "I will accept that which is offered as barley; let me know what sort it is, as it will do well for seed." The contract was performed by the delivery of that particular barley. In order to vary the meaning of the term "seed barley," the evidence should have been clear, cogent and irresistible: *Lewis v. Marshall* (a). Some witnesses, however, stated that "seed barley" only meant a barley which would produce seed. It also appeared that fen barley, if sown in the uplands, would produce good malting barley. There was no evidence that the term "seed barley" imported "barley fit for malting purposes." [*Pollock*, C. R.—The 3 Geo. 4, c. 30, ss. 2, 5, mentions maltsters from bear or bigg, and maltsters from barley.]

(a) 7 Man. & G. 729.

*Hawkins* and *G. Shaw*, in support of the rule.—Either there was a warranty that the article sold was “seed barley,” or there was a contract to sell “seed barley.” The representation was made at the time of the sale, and therefore the case is distinguishable from *Hopkins v. Tanqueray* (a). If a person goes into a shop and asks for a commodity of a certain kind, and the shopkeeper produces a sample which he says is that particular commodity, there is an implied warranty that the thing sold is of that description. *Gardiner v. Gray* (b) decided that where, before or at the time of sale, a specimen of the goods is exhibited to the buyer, if there be a written contract which merely describes the goods as of a particular denomination, this is not a sale by sample; but there is an implied warranty that they shall be of a merchantable quality of the denomination mentioned in the contract. The letter of the 13th January, 1857, shews that there was a warranty that the barley sold was “seed barley.”

1859.

CARTER

v.

CRICK.

MARTIN, B.—I am of opinion that the rule ought to be discharged. I think there was no warranty. The plaintiff, having heard that the defendant had some barley to sell, went to the defendant’s counting-house, when the person who managed his business produced a sample of barley which was supposed to be seed barley. The plaintiff agreed to buy it as seed barley; and the impression on the mind of both parties was that the barley was seed barley. The plaintiff purchased that particular thing which the defendant called seed barley, and the plaintiff called seed barley: it is the same as if they had given it any other name.—Upon the other point I entertained some doubt; but I think that seed barley means barley ordinarily sown by farmers, and which will produce seed. The plaintiff has

(a) 15 C. B. 130.

(b) 4 Camp. 144.

1859.

CARTER  
v.  
CRICK.

brought the loss upon himself, for he gave a warranty that the barley was "Chevalier seed barley," when he had no warranty that it was such.

BRAMWELL, B.—I am also of opinion that the nonsuit was right. I do not doubt the proposition contended for on behalf of the plaintiff, that a statement at a sale may be a warranty although the word "warrant" is not used. If a person asks a dealer for a particular article, and he produces something which he says is the particular article, that amounts to a warranty. Here there is no warranty: both parties say that the barley is seed barley.—Then, as to the other point, the ordinary meaning of "seed barley" is barley which will germinate. If by a custom in the trade "seed barley" means anything more, viz. barley used for malting purposes, that ought to have been proved. Therefore it seems to me that the plaintiff's case fails, because he says that the barley was not seed barley, and he has not shewn anything to vary the ordinary import of the term.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. My judgment proceeds on this ground, that there was no evidence of a warranty. I do not mean to suggest, that where there is a representation of a distinct article by the seller, that might not amount to a warranty although the word "warrant" was not used. At first I thought that the letter of the 13th January, 1857, might be evidence of a warranty; but on consideration I think it is not. The defendant's servant simply produced an article of which the plaintiff had as much knowledge as he had, and which might or might not lead the plaintiff to purchase it. Each arrived at the conclusion, as a matter of opinion, and as a matter of opinion only, that the barley was seed barley. The opinion might be unfounded, and therefore to

obtain information the letter is written asking what sort of barley it is.

1859.

CARTER  
v.  
CRICK.

POLLOCK, C. B.—I agree that the rule ought to be discharged. There was clearly no warranty. The utmost that took place was a representation that the barley was seed barley: there was scarcely even that, for both parties took it for granted that it was. Where a nonsuit is directed, and upon the matter coming to be examined it turns out that the plaintiff has no case upon which he could succeed on another trial, it is idle to grant a new trial upon the ground that the Judge has improperly nonsuited. A new trial is a substitute for a bill of exceptions, and if in this case a bill of exceptions had been tendered, and it appeared that there was no evidence that the term “seed barley” meant any thing more than barley which would produce seed, the Court of Error would not have awarded a venire de novo. At the trial I was of opinion, and still think, that if a party seeks to make out that certain words used in a contract have a different acceptation from their ordinary sense, either for the purposes of trade, or within a certain market, or a particular county, he must prove it; not by calling witnesses, some of which say it is one way and some the other, and then leaving it to the jury to say which they believe, but by clear, distinct and irresistible evidence.

Rule discharged.

---

1859.

May 5.

## FEWINS v. LETHBRIDGE.

The mere entry of judgment is sufficient within the 139th section of the Common Law Procedure Act, 1852, which enacts "that the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after the verdict;" and it is not necessary to perfect the judgment by taxation of costs.

THIS was an action for slander which was tried at the Devonshire Summer Assizes, 1858, when a verdict was found for the plaintiff, with 100*l.* damages. Two days after the trial the defendant died. On the 28th March, 1859, notice of taxation was given for the following day. The defendant's attorney objected to the taxation, on the ground that two terms had elapsed since the death of the defendant. The Master taxed the costs, and delivered his allocatur for 124*l.* 4*s.* 6*d.* to the plaintiff's attorney, who, on the same day, caused the allocatur to be entered in the Master's book of judgments, as the costs of the trial and of judgment previously signed in the action.

*Coleridge* now moved to set aside the Master's allocatur.—By the 139th section of the Common Law Procedure Act, 1852, "the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict." The words "judgment entered" mean final judgment, and until the costs are taxed and Master's allocatur given the judgment is not final: *Butler v. Bulkeley* (a), *Godson v. Lloyd* (b), *Peirce v. Derry* (c). [*Martin, B.*—In Archbold's Practice, vol. 2, p. 1474, it is said, "It is not necessary that the judgment should be actually entered upon the roll within two terms after the verdict; if it be signed within that time it is sufficient."] Under the 1 & 2 Vict. c. 110, s. 17, interest runs on a judgment debt from the time of the entry

(a) 1 Bing. 233.

(b) 1 Gale, 244.

(c) 4 Q. B. 635.

of the incipitur: *Fisher v. Dudding* (a), *Newton v. The Grand Junction Railway Company* (b); but the words of that statute are, that every judgment debt shall carry interest “*from the time of entering up the judgment*;” the words of the Common Law Procedure Act are, “*so as such judgment be entered*.” That means final judgment. [*Pollock*, C. B.—There is nothing to make “entering up” inceptive and “entering” final. *Bramwell*, B.—The case of *Webb v. Spurrell* (c) is an authority in point. There the “plaintiff recovered a verdict, and after the trial and before final judgment signed, died intestate. Plaintiff’s administrator caused final judgment to be signed within two terms after the verdict, but the roll was not brought into the office nor entered upon record. After the two terms elapsed, the defendant left a caveat with the clerk of essoins against receiving the roll, and an action of debt being brought by the plaintiff’s administrator on the judgment, *Draper*, for defendant, moved to stay the entry of judgment, the same not having been entered within two terms, according to the statute 17 Car. 2, c. 8, and obtained a rule to shew cause; which upon hearing *Prince* for the plaintiff, was discharged. *Per Curiam*: In this case the signing must be considered as the entry: the fee for entering the final judgment was paid to the clerk of the judgments at the time it was signed: the roll must be received and filed nunc pro tunc.”] Until the costs are taxed and inserted the judgment is merely inchoate: it becomes final upon the entry of the amount of the allocatur in the Master’s book.

1859.

FEWINS

v.

LETHBRIDGE.

POLLOCK, C. B.—We are all of opinion that there ought to be no rule. The language of the 139th section of the

(a) 3 Man. &amp; G. 238.

(b) 16 M. &amp; W. 139.

(c) Barnes, 261.

1859.  
 FEWINS  
 v.  
 LETHBRIDGE.

Common Law Procedure Act, 1852, is precisely the same as that of the 17 Car. 2, c. 8, s. 1; and the case of *Hele v. Baker* (a), which was decided in the 20 Car. 2, is a contemporaneous exposition of the statute of Charles. In that case there was a verdict, and before the day in banc the plaintiff died; after which there was not any judgment actually entered within two terms, but the judgment was signed the second term, and upon that execution. And the question was, if this was aided within the statute 17 Car. 2, c. 8. And per *Curiam*: The signing of the judgment as before is an entering of judgment within the statute. There are authorities that under the 1 & 2 Vict. c. 110, s. 17, a judgment debtor is entitled to interest from the time of the entry of the judgment; but Mr. *Coleridge* attempted to make a distinction between “entering up judgment” and “entering judgment;” and he argued that the former meant an inchoate, the latter a perfect judgment. If there is any difference, I should have thought it was the other way.

MARTIN, B.—The words of the 139th section of the Common Law Procedure Act, 1852, are identical with those of the statute of Charles; and we ought to follow the construction which had been put on that statute. I find it laid down in *Wms. Saund.* (b) that the judgment “should be entered, or at least signed, within two terms after the verdict; for signing the judgment is an entering of it within the statute.”

BRAMWELL, B.—I am of the same opinion. If I had to consider for the first time, and without authority, the meaning of the words “so as such judgment be entered,” I should have thought that the making an entry of the judgment would be sufficient. There are however authorities for our

(a) 1 Sid. 385.

(b) Vol. 2, p. 724, note.

so holding. On the other hand, the case of *Peirce v. Derry* (a) is relied on as an authority that there is no entry of judgment until the costs have been taxed. There the plaintiff had entered up final judgment as of the day when the original entry was made, and the Court ordered the date of the judgment to be altered to the day of taxation of costs; therefore it was not necessary to consider the statute of Charles. But if they meant to lay down a positive rule that for all purposes there is no judgment until the costs are taxed, that is opposed to the authorities. For the purpose of this statute, judgment is signed when the original entry is made.

1859.  
 FEWINS  
 v.  
 LETHBRIDGE.

Rule refused.

(a) 4 Q. B. 635.

THE MONMOUTHSHIRE CANAL AND RAILWAY COMPANY v. JAMES HILL and W. F. BATT. *April 27.*

**DECLARATION.**—That the defendants broke and entered certain land of the plaintiffs, called “The Towing Path of the Monmouthshire Canal,” and broke down, dug up and destroyed the fences of the plaintiffs being thereon, and placed and carried over the said towing path large quantities of goods, and thereby obstructed the said towing path and the navigation of the said canal.

**Plea.**—That the canal and towing path were made after the passing of an Act (32 Geo. 3, c. 102(a)): that the de-

A Canal Act, 32 Geo. 3, c. 102, empowered the lord of any manor, &c., and the owner of any lands through which the canal should be made, to erect and use any wharfs, quays, landing places or warehouses in or upon their respective

lands adjoining or near to the said canal, and to land any goods or other things upon such wharf, &c., or upon the banks lying between the same and the canal; and also to make convenient places for boats to lie and turn in, so that the making or using the same respectively do not obstruct or prejudice the navigation of the canal or any towing paths or sides thereof.—*Held*, that an owner of land adjoining the towing path had a right to erect a wharf on his own soil, and to land goods on the towing path and convey them across it to his own wharf.

(a) “An Act for making and maintaining a navigable cut or canal from, or from some place near Pontnewynydd into the river

1859.  
 MONMOUTH-  
 SHIRE CANAL  
 AND  
 RAILWAY CO.  
 v.  
 HILL.

fendants were the owners of certain lands through which the said canal and towing path had been made, and which

Usk at or near the town of Newport, and a collateral cut or canal from the same at or near to a place called Cryndau Farm, to or near to Crumlin Bridge, all in the county of Monmouth; and for making and maintaining railways, or stone roads from such cuts or canals to several iron works and mines in the counties of Monmouth and Brecknock."

Section 1. After reciting that "the making and maintaining of a cut or canal, for the navigation of boats, barges and other vessels, &c., will not only open an easy and commodious communication with divers iron works, &c., and with large and extensive tracts of land abounding with iron and coal, whereby the conveyance of iron, lime, timber, and coals from these places to the Bristol Channel will be greatly facilitated and rendered less expensive, but will also in other respects be of great public utility:" enacts that the proprietors shall be united into a Company, for the purpose of making the canals and railways, "and also to make, set out and appoint such towing paths, banks, roads and ways for the towing, haling and drawing of boats, barges and other vessels passing in, through or upon the said cuts or canals with men, horses or otherwise," &c., as the Company shall think proper.

By section 61, the Company are to "divide and separate, and keep constantly divided and separated, the towing paths on the sides" of the cuts, in such manner as shall

be thought necessary by the Commissioners, "from the lands or grounds adjoining to such towing paths," with posts and rails or other fences, and shall erect gates across the towing paths and bridges "for the use of the owners and occupiers of the lands, &c., adjoining to such canals, &c., and towing paths."

By section 62, in case of failure to fence off towing paths and make bridges, &c., the owners of adjoining lands may do the same at the Company's expense.

By section 104, every person shall have free liberty to use the private ways belonging to the Company, (except the towing paths), for the conveying goods and other things to and from the canals and railways, and the wharfs, quays or landing places belonging thereto, and also to use the wharfs, quays and landing places for the loading and unloading of any goods, and the towing paths for the haling of boats, on payment of tolls.

By section 128, owners of mines and iron works, &c., within the distance of eight miles, are empowered to make railways, for the purpose of conveying goods to or from the canals, in case the Company refuse to do so.

By section 130, the proprietors of mines, &c., furnaces, forges, &c., within the distance of two miles, from the canals are empowered to make cuts to communicate with the canal.


By section 134, "it shall be


said lands were near and adjoining to the said towing path and canal: that the trespasses were committed in the erecting and using by the defendants, under and by virtue of the provisions of the said Act, a wharf, quay and landing place in and upon the said lands, and in landing from the canal, in a reasonable and proper manner, goods and other things upon such wharf, quay and landing place, and upon the banks lying between the same and the canal, the said towing path being one of such banks: that the defendants did not at any of the times aforesaid, obstruct, or prejudice the navigation of the canal, or the towing path, or any towing paths on the sides of the canal; and because the wharf, quay and landing places could not be erected and used, nor could goods or other things be landed thereon from the canal, without a little breaking down, digging up and destroying the fences; therefore the defendants did to a small and reasonable extent commit the trespasses to the fences, doing no unnecessary damage.

Replication.—That the land of the plaintiffs, in the declaration mentioned, was used as the towing path of the canal, and the same lay between the canal and the lands of which the defendants were owners, and such last mentioned lands adjoined the towing path, but did not otherwise adjoin the canal; and the said wharf, quay and landing place, in

lawful for the lord or lords of any manor, and the owner or owners of any lands or grounds through which the said canals, &c., shall be made, to erect and use any wharfs, quays, landing places, cranes, weigh-beams or warehouses in, or upon their respective lands, grounds, or wastes adjoining, or near to the said canals, &c., and to land any goods, or other things upon such wharfs,

quays or landing places, or upon the banks lying between the same and the said canals, &c.; and also to make and use proper and convenient places for boats, barges and other vessels to lie and turn in, and pass each other, so that the making, or using thereof respectively, do not obstruct or prejudice the navigation of the said canals, &c., or any towing paths on the sides thereof."

1859.  
  
 MONMOUTH-  
 SHIRE CANAL  
 AND  
 RAILWAY Co.  
 v.  
 HILL.


1859.  
  
 MONMOUTH-  
 SHIRE CANAL  
 AND  
 RAILWAY CO.  
 J.  
 HILL.

the plea mentioned, could not be used for the landing from the canal of goods or other things thereon, except by first landing the same upon and taking the same across the towing path.

Demurrer and joinder.

*Phipson* (with whom was *Henniker*), in support of the demurrer.—The object of this Act was to open up the country through which the canals were intended to be made, and to give facilities to the owners of land for conveying goods on the canals; and for that purpose the 134th section empowers the lord of any manor or the owners of any lands, through which the canals shall be made, to erect and use wharfs and landing places upon their respective lands adjoining or near to the canals, and to land any goods upon such wharf or upon the banks lying between the same and the canals. The plea avers that the trespasses were committed in landing goods on the banks lying between the wharf and the canal. The replication alleges that the bank was used as the towing path of the canal. Now, in order to make the replication good, it is necessary for the plaintiffs to establish that the word “banks” in the 134th section means “banks not used as towing paths.” The provision, that the making or using of the landing places shall not obstruct any towing paths on the sides of the canal, is not meant to prevent such owner from landing goods across the towing path. [*Martin*, B.—It would prevent persons from using the towing path as a permanent place of deposit.] The works of the canal, such as the towing path, may be properly said to be part of the canal, and land which adjoins to the towing path to adjoin the canal. The 130th section contains a power to make cuts to communicate with the canal. The plaintiffs would read that section as empowering adjoining owners to make cuts communicating with the

canal, so that they do not cut through the towing path. But the defendants contend that this may be done if the towing path is carried over the cuts by a bridge. The 128th section empowers persons within eight miles to make railways to the canal. That power would be useless if the railways could not be run up to the boats.

1859.  
  
 MONMOUTH-  
 SHIRE CANAL  
 AND  
 RAILWAY CO.  
 v.  
 HILL.

*Gray*, for the plaintiffs.—The defendants should have crossed the canal by a bridge and made a wharf on the further side. The 61st section expressly provides that the towing paths shall be kept separate from the adjoining lands by posts and rails or other fences. Section 104 empowers all persons to use the private roads of the Company, except the towing paths, for conveying goods to and from the canals, and the wharfs belonging thereto and the towing paths for the haling of boats. Towing paths being so prominently mentioned, the Court cannot say that the word “banks” in the 134th section is meant to apply to the bank on which the towing path runs. Had it been intended to give power to land goods on the towing path, the towing path would have been expressly mentioned. [*Martin*, B.—The intention seems to have been to give the owner of adjoining land power to make a wharf on his own land, to pass the fence and to carry his ore over the towing path to the canal, though he has no right to keep a plank down so as to interfere with a horse coming along the path.] The owners of land adjoining the towing path can take no benefit under the 134th section.

*Phipson*, in reply.—Section 104 prohibits the public from using the towing paths, but in the sections which relate to owners of lands adjoining or near to the canal there is no such exception. [*Bramwell*, B.—The Act supposes the owner of adjoining land to have power to get to the water.

1859.


MONMOUTH-  
SHIRE CANAL  
AND  
RAILWAY CO.  
v.  
HILL.

According to the plaintiffs' construction he cannot do so unless he has land on both sides of the canal.]

POLLOCK, C. B.—We are all of opinion that the defendants are entitled to judgment. The question turns on the 134th section of the 32 Geo. 3, c. 102. It was contended on behalf of the plaintiffs that persons who have lands adjoining the canal on the side where the towing path is are not entitled to cross the towing path. Mr. *Phipson* contends that they have the right to cross provided they do not interfere with the use of the towing path. The section in question gives a right to lords of manors and the owners of any lands through which the said canals shall be made, to erect and use wharfs, quays, &c., on their respective lands, &c., adjoining or near to the said canals, and to land any goods or other things upon such wharfs, or upon the banks lying between the same and the said canals, so that the making or using thereof do not obstruct or prejudice the navigation of the canals or any towing paths on the sides thereof. The pleadings state that what was done by the defendants was done in using their wharf and landing goods on the banks and that they did not obstruct the towing paths. The defendants bring themselves within the very terms of the 134th section.

MARTIN, R.—I am of the same opinion. The canal banks are the land on either side confining the water in its channel. The towing path is a way for cattle, horses or men to draw the boats—the road along which the animals or men pass. The 134th section must be looked at, and bearing that in mind the word "banks" means the banks on both sides of the canal. Now the 134th section enables that it shall be lawful for owners of land, &c., to erect and use any wharfs on their respective lands, and

to land any goods on such wharfs, or on the banks lying between the same and the canals—(it should be observed that the word is “banks,” not “bank,”); and to make convenient places for boats to lie in, with this qualification—that the making or using thereof respectively shall not obstruct or prejudice the navigation or towing paths on the *sides* (not side) thereof. This latter clause applies not merely to making but using wharfs. I understand the meaning to be that parties are entitled to make use of the “banks,” by which I understand the soil which confines the water and separates it from the adjoining land. But all such rights are to be subordinate to the right of the canal Company to have the towing path unimpeded. Were any other construction to be put on the Act, it would give the canal Company the power at their own pleasure to deprive the adjoining owners of the right to use the canal.

1859.  
  
 MONMOUTH-  
 SHIRE CANAL  
 AND  
 RAILWAY CO.  
 HILL.

BRAMWELL, B.—I am of the same opinion. Mr. *Gray's* argument is, that section 134 applies to the owners of land on one side only of the canal. But the language is, that it shall be lawful “for the owners of any lands through which the canals shall be made to erect and use any wharf upon their *respective* lands adjoining or near to the said canals, and to land any goods upon such wharfs or upon the banks lying between the same and the said canals;” that means on the land on each side of the canal.

CHANNELL, B.—I am of the same opinion. In construing the statute we must do so so as to make every part of it consistent. Contemplating the formation of the canal, it secures advantages to the owners of land adjoining the canal. It is admitted that if the bank in question, bounding the canal, was a bank not used as a towing path, the defendants would be justified in what they have done. But

1859.  
 MONMOUTH-  
 SHIRE CANAL  
 AND  
 RAILWAY CO.  
 v.  
 HILL.

it is said that, being a towing path, the right which the defendants contend for does not exist. But I see no reason for such a construction. In the 1st section the Company are empowered to set out "towing paths, banks, roads and ways, for the towing, haling and drawing of boats." This shews that the word "banks" is used in the same sense as the word "towing paths." The public interest is sufficiently protected by making the rights given to the adjoining owners subordinate to those given to the public.

Judgment for the defendants.

May 3. THE METROPOLITAN COUNTIES AND GENERAL LIFE  
 ASSURANCE, ANNUITY, LOAN AND INVESTMENT  
 SOCIETY v. BROWN.

By indenture  
 of the 23rd  
 September,  
 1856, B.  
 mortgaged to  
 V. certain  
 premises as a  
 security for a  
 loan of 2500l.  
 The deed con-  
 tained a power

EJECTMENT for land and premises in Sheffield, called "The Albion Iron and Steel Works." By the writ, which was dated the 5th January, 1859, the plaintiffs claimed to have been entitled to possession on the 15th November, 1858.

At the trial, before *Willes, J.*, at the last Yorkshire Spring of sale in default of payment of the principal and interest on a certain day: also a power for the mortgagees "at any time or times after such default" to enter upon the premises. The deed also contained the following provision:—"Lastly, to the intent that the said V. may have for the recovery of the interest accruing on the principal money hereby secured the same powers of entry and distress as are by law given to landlords for the recovery of rent in arrear, the said B. doth hereby attorn and become tenant from year to year to the said V. of the said premises hereby assigned, at and under the yearly rent of 125l., to be paid by half-yearly payments on the 23rd March and 25th September. Nevertheless it is hereby agreed that in the event of any sale under the powers hereinbefore contained, the attornment and tenancy hereby created shall, as regards such portion of the premises as shall be sold, be at an end; and that without any previous notice to put an end to the same." By indenture of the 18th February, 1857, B. assigned by way of mortgage all his interest in the mortgaged premises to the plaintiffs, as a security for a loan of 1500l. By indenture of the 27th October, 1858, V. assigned his mortgage to the plaintiffs. On the 12th November, 1858, the plaintiffs gave B. notice that they had entered on the premises under the provisions contained in the mortgage deed of the 23rd September, 1856. B. refused to give up possession, and on the 25th November the plaintiffs distrained B.'s goods for rent alleged to be due up to the 25th September.—*Held*, that the clause of attornment in the indenture of the 23rd September, 1856, did not create a tenancy from year to year with all its incidents; and that the plaintiffs might maintain ejectment against B. without giving him six months' notice to quit.

Assizes, the following facts appeared.—By indenture of the 23rd September, 1856, between W. Brown (the defendant) of the one part, and B. Vickers, E. Lowe, and E. Vickers of the other part: after reciting (inter alia) an indenture, whereby the land in question was demised to the defendant for a term of 800 years: also reciting that the defendant had erected on the demised land a rolling mill, steam engine, and other machinery: The defendant, in consideration of 2,500*l.* lent to him by B. Vickers, E. Lowe, and E. Vickers, assigned to them by way of mortgage the land and machinery, with a proviso for redemption on payment of the principal and interest on the 23rd March, 1857. There was the usual covenant for payment on that day, followed by a proviso, that the mortgagees might at any time or times after default, sell the premises. There was also a proviso that if default should be made in payment of the principal and interest at the time specified, it should be lawful for the mortgagees “at any time or times after such default to enter into or upon” the land and machinery thereby assigned. The deed also contained the following clause:—“Lastly, and to the intent that the said B. Vickers, E. Lowe, and E. Vickers, their executors, administrators and assigns, may have for the recovery of the interest accruing on the principal money hereby secured, the same powers of entry and distress as are by law given to landlords for the recovery of rent in arrear, the said W. Brown doth hereby attorn and become tenant from year to year to the said B. Vickers, E. Lowe, and E. Vickers, their executors, administrators and assigns of the said parcel of land, rolling mill, &c., and premises hereinbefore assigned, at and under the yearly rent of 125*l.*, clear of all deductions, to be paid by equal half-yearly payments on the 23rd day of March and 25th day of September in every year, the first payment whereof to be made on the 25th March now next.

1859.

  
METROPOLITAN COUNTIES  
ASSURANCE  
COMPANY

v.  
BROWN.

1859.  
 METROPOLITAN COUNTIES  
 ASSURANCE  
 COMPANY  
 v.  
 BROWN.

Nevertheless it is hereby agreed that in the event of any sale under the powers hereinbefore contained, the attornment and tenancy hereby created shall as regards such portion of the premises as shall be sold, be at an end; and that without any previous notice to put an end to the same."—By indenture of the 18th February, 1857, between the defendant of the one part and the plaintiffs of the other part, the defendant in consideration of 1,500*l.* lent to him by the plaintiffs, assigned to them by way of mortgage the same land and machinery: "And all the estate, title, term of years, claim and demand whatsoever both at law and in equity of him the said W. Brown in the same leasehold hereditaments, fixtures and premises:" habendum for the residue of the said term of 800 years, subject to the indenture of mortgage of the 23rd September, 1856. By indenture of the 27th October, 1858, B. Vickers, E. Lowe, and E. Vickers assigned their mortgage to the plaintiffs. On the 12th November, 1858, the plaintiffs served the defendant with a notice of the assignment, and that they had entered upon the premises under the provisions contained in the mortgaged deed of the 23rd September, 1856. The defendant refused to give up possession, and on the 25th November the plaintiffs distrained the defendant's goods on the premises for 187*l.*, alleged to be due for rent up to the 25th September.

It was submitted on behalf of the defendant, that there was a subsisting tenancy at the time of the alleged title. The learned Judge directed a verdict for the plaintiffs, reserving leave to the defendant to move to enter a verdict for him.

*Atherton*, in the present term, obtained a rule nisi accordingly; against which

*Overend* and *Quain* shewed cause.—First, the tenancy

created by the clause of attornment in the indenture of the 23rd September, 1856, did not subsist at the time the ejectment was brought. By the indenture of the 18th February, 1857, the defendant conveyed to the plaintiffs all his interest in the premises. The plaintiffs being possessed of the yearly term, the reversion passed to them by the assignment of the 27th October, 1858, and the term then merged in the reversion.—Secondly, assuming that any tenancy subsisted, it was not a tenancy subject to the ordinary incidents of a tenancy from year to year, but a mere tenancy at will. The deed empowers the mortgagee to enter at any time or times on default in payment, and the tenancy at will was determined by the notice of the 12th November, 1858. In *Doe d. Snell v. Tom* (a) the mortgage deed contained a clause by which the mortgagor attorned tenant to the mortgagee at an annual rent: there was also a power of entry in case of default in payment of the mortgage money; and it was held that the mortgagee might bring ejectment without giving the mortgagor any notice to quit. That case was decided on the authority of *Doe d. Garrod v. Olley* (b), where the mortgage deed contained an agreement that the mortgagor during his occupation of the premises should pay the mortgagee an annual rent, and that it should be lawful for the mortgagee to use such remedies by distress and sale for the recovery of the rent as landlords have on common demises: provided that the reservation of such rent should not prejudice the mortgagee's right to enter and evict the mortgagor at any time after default in payment of the monies secured or any part thereof. It was held that, after default in payment of the principal and one half year's rent, the mortgagee might eject the mortgagor without any notice to quit, though he had treated the mortgagor as tenant by distraining on him

(a) 4 Q. B. 615.

(b) 12 A. &amp; E. 481.

1859.

METROPOLITAN  
COUNTIES  
ASSURANCE  
COMPANY  
v.  
BROWN.

1859.

METROPOLITAN  
 COUNTY ASSURANCE  
 COMPANY  
 v.  
 BROWN.

for a previous year's rent. The effect of a clause that the mortgagor shall become tenant to the mortgagee at a rent is discussed in 1 Smith's Lead. Cas. p. 447, 4th ed. It will be argued that the distress on the 25th November was a recognition of an existing tenancy; but that distress was for rent due on the 23rd September, and therefore it was no recognition of a tenancy at the time the ejectment was brought. In *Doe d. Wilkinson v. Goodier* (a) the mortgagee, under a power in the mortgage deed enabling him to distrain for arrears of interest "in like manner as for rent," distrained after the date of the demise in the declaration, but for arrears due before such demise, the mortgagor having (without any express provision in the deed enabling him to do so) continued in possession: and it was held that such distress did not amount to a recognition of the mortgagor as tenant, so as to disable the mortgagee from bringing ejectment. Moreover, the Court of Queen's Bench has decided that the power to distrain was put an end to by the assignment, and consequently the distress was unlawful (b).

*Atterton and T. Jones*, in support of the rule.—The clause of attornment created a tenancy from year to year, which could only be determined by six months' notice to quit. [Pillick C. B.—The clause expresses the intent for which the tenancy is created, viz. that the mortgagee may have for the recovery of the interest the same powers of entry and distress as are by law given to landlords for the recovery of rent in arrears. Suppose the words had been, "and to the intent and for no other purpose," that would exclude the ordinary incidents which would attach to a

(a) 12 Q. B. 467.

(b) *Stones v. The Metropolitan**Insurance and General Life Assurance**and Savings Co. B. April 19, 59.*

1358.

tenancy from year to year. A tenancy may be coupled with any lawful condition.] Some contracts have incidents attached to them which cannot be got rid of. The question is one of construction, and the power of entry on default in payment is qualified by the clause of attornment; for the latter provides that "in the event of any *sale* the tenancy thereby created shall, as regards such portion of the premises as shall be sold, be at an end, without any previous notice to put an end to the same." That excludes any intention that the tenancy should be put an end to by the clause of re-entry. The words in that clause, "at any time or times after default," mean at any time or times upon "sufficient notice given." In *Doe d. Garrod v. Olley* (a) there was an express provision that the reservation of the rent should not prejudice the mortgagee's right of entry. In *Doe d. Snell v. Tom* (b) there was no provision, as in this case, that the clause of attornment should not prevail against the power of sale. Those decisions cannot be relied on in construing this deed, the terms of which are materially different from the deeds in those cases. Here a tenancy from year to year is created by express terms, and that cannot be reconciled with the clause of re-entry unless the mortgagee is to make his election.

POLLOCK, C. B.—This is an action of ejectment in which the learned Judge directed a verdict for the plaintiff reserving leave to the defendant to move to enter a nonsuit on the ground that no notice to quit had been given. The defendant's counsel contended, upon the authority of *Doe d. Snell v. Tom*, that the true construction of the proviso in the deed of the 23rd September, 1856, was to create a

(a) 12 A. &amp; E. 481.

(b) 4 Q. B. 615.


1859.

METROPOLI-  
TAN COUNTIES  
ASSURANCE  
COMPANY  
v.  
BROWN.

tenancy from year to year, under which the defendant had a right to continue as tenant until he received a notice to quit putting an end to the tenancy. On the part of the plaintiff it was contended that, assuming the effect of the proviso in the deed was to create a tenancy from year to year, yet the clause of re-entry overrides it; and that such a tenancy was not created with all its incidents, but solely for the purpose of giving the mortgagees a right to distrain. As a pure question of construction I have felt some difficulty. This belongs to a class of cases with which I am not so familiar as to be able to say at once what is the necessary meaning of the provisions, but I have satisfied myself that they may mean what is contended for on behalf of the plaintiff. If we have any assistance from decided cases we ought not to overrule them; but it seems to me that we have little or none. *Doe d. Snell v. Tom* (a) appears to decide cases of this sort, though this distinction may be taken, that there the clause of attornment did not, as here, provide that upon a sale the tenancy should be at an end without any previous notice. In construing this deed we ought rather to look at the intention of the parties than any supposed meaning of certain words. I think that whatever weight may attach to the words that the mortgagee "doth hereby attorn and become tenant from year to year," that is overbalanced by the expression that the tenancy was created to give the mortgagees a right to distrain for the arrears of interest. If the mortgagor was subjected to any real grievance in not having a notice to quit, there might be some reason for putting a different construction on the clause; but he has taken a tenancy, apparently not for the benefit of himself but in order to give the mortgagee a right to distrain. It seems to me


(a) 4 Q. B. 615.

that the clause of attornment did not create a tenancy from year to year with all its incidents and that, looking at the deed in its entirety, the true construction is that the right of entry overrides the other provision; and therefore, notwithstanding the tenancy thereby created, the mortgagee may re-enter on default in payment of the interest. We have thus attained the grammatical and true construction of the deed, and we act in accordance with the decided cases in saying this rule ought to be discharged.

1859.  
  
 METROPOLITAN COUNTIES  
 ASSURANCE  
 COMPANY  
 v.  
 BROWN.

MARTIN, B.—I am of the same opinion. On the 23rd September, 1856, the defendant mortgaged these premises to Vickers, Lowe and Vickers. On the 18th February the defendant executed a second mortgage to the plaintiffs; and on the 27th October, 1858, the plaintiffs obtained an assignment of the first mortgage. On the 12th November they gave a notice which would have had the effect of determining the defendant's tenancy, if it was a tenancy at will; but the defendant refused to give up possession. They then waited until the 25th of November, when they made a distress for rent as due upon the 25th September, 1858. On these facts the question is, whether upon the true construction of the mortgage deed of the 23rd September, 1856, the plaintiffs are entitled to enter without a six months' notice to quit. This deed recites that the defendant was possessed of the residue of a term of 800 years, and being in want of 2,500*l.* he mortgages it for that sum, with the condition that if the money be paid before the 23rd March the mortgage shall be re-assigned. There are then several covenants and conditions for the security of the mortgagees. There is a power to sell, a power to enter, and lastly a tenancy is created; but that is given in distinct terms for the benefit of the mortgagees, that they may have a right to distrain.

1859.

  
 METROPOLI-  
 TAN COUNTIES  
 ASSURANCE  
 COMPANY  
 v.  
 BROWN.

It is now contended that this clause creates a tenancy from year to year, with all its incidents; and therefore it can only be determined by a six months' notice to quit. I think that instead of creating any interest in favour of the mortgagor, it creates a tenancy only in favour of the mortgagee. If the clause were construed by itself it would create a tenancy which could only be determined by a six months' notice to quit; but looking at the object of the deed, which was to give a security for the money lent, it must be construed with reference to the other provisions. Then the concluding part of the clause provides that in the event of a *sale* the tenancy shall be at an end; and it was contended, on the principle that *expressio unius est exclusio alterius*, that this shewed that the tenancy was to continue if no sale took place. But I am of opinion that this provision does not affect the previous right of entry; and further that under the indenture of the 18th February, 1857, whatever interest existed in the defendant passed to the plaintiffs. Whether there was a tenancy at will or a mere wrongful possession by the mortgagor, the notice of the 12th November, 1858, was a sufficient demand of possession to give a right of entry. Then what was the effect of the distress? None whatever, for as there was no tenancy, the distress was unlawful. For these reasons I think that the rule ought to be discharged.

BRAMWELL, B.—I am of the same opinion. The clause in question did not create a tenancy from year to year with all its incidents. The power of sale is unlimited in terms, viz. that the mortgagee may enter *at any time or times after default*. It is sought to qualify those words by the last clause, but in my opinion that is a provision in favour of the mortgagee. The power of entry is not inconsistent with that clause. If

the mortgagee sold the whole or a part of the premises, the tenancy would be ipso facto at an end; if there was no sale, the tenancy would continue until the mortgagee entered.

1859.

METROPOLITAN COUNTIES  
ASSURANCE  
COMPANY

v.  
BROWN.

CHANNELL, B.—I entertained some doubt during the argument, but am now satisfied that the view of my learned brothers is correct. The question depends on the construction of the deed of the 23rd September, 1856, for the facts are not disputed. I agree that the parties contemplated a tenancy from year to year, but that need not be a tenancy with all the incidents which usually attach to a tenancy from year to year. The doubt I have had arose from the latter part of the last clause, but on consideration I think that this case is governed by *Doe d. Garrod v. Olley*. I admit that the words of this deed are stronger, but both cases are alike in this respect, that though a tenancy from year to year is created, there is a provision that the mortgagee may enter at any time upon default in payment. Then *Doe d. Garrad v. Olley* being so far similar, is this case affected by the words that in the event of a sale the tenancy shall be at an end without any notice to quit? It is impossible to give to those words the construction contended for on the part of the defendant without qualifying the express power given by the clause of entry.

Rule discharged.



1859.

May 10.

DAME HARRIET LUCY TANCRED *v.* ALLGOOD.

First count: that plaintiff was the owner of goods which had been let to hire to one T. for a term, and that the defendant sold the goods and dispersed them so as to prevent the same being followed or found, whereby plaintiff was injured in her reversionary estate.

Second count: similar to the first, except that it alleged that the goods were let to T. "to be used in a certain house and not otherwise or elsewhere: that T. had the use of the goods, subject to the expiration of the term and subject to the determination of the term, by the violation of the terms thereof."

Pleas: that the defendant seized and took and sold the goods, not in market overt, but as sheriff

under a writ of *fi. fa.* against T., and that the plaintiff had not sustained and would not sustain any damage by reason of the premises.—*Held*, that as the damages sustained by the plaintiff were the foundation of the action, the pleas were an answer to the action.

**FIRST** count.—That at the time of the commission of the grievances the plaintiff was the owner and proprietor of certain goods, which had been and were let to hire, for a term unexpired, to one Sir Thomas Tancred, who then had the use and possession under such letting, the reversionary property, estate and interest in the said goods belonging to the plaintiff: that the defendant, well knowing the premises, wrongfully seized and took the said goods out of the possession of Sir T. Tancred, and absolutely sold the said goods, and converted and disposed thereof, and dispersed them so as to prevent the same being followed or found, whereby the plaintiff was injured in her reversionary estate in the goods.

Second count.—That at the time of the grievances the plaintiff was the owner of goods which had been let to hire, and for a term unexpired, to Sir T. Tancred, and then only for use upon a certain messuage and premises, and not otherwise or elsewhere: that Sir T. Tancred had the use and possession of the goods, under such letting to hire, upon and subject to the terms thereof, the reversionary property, estate and interest in the said goods, expectant upon the expiration of the term, or upon the determination of the contract and hiring, by the violation of the terms thereof, then belonging to the plaintiff; yet the defendant, well knowing the premises, wrongfully seized and took the goods out of the possession of Sir T. Tancred and removed them out of the

said messuage and premises, and absolutely sold to divers persons the said goods and all the title and interest therein, including not only Sir T. Tancred's interest and the right to use the same in the said messuage and premises, but also the reversionary property, estate and interest of the plaintiff, and the right to remove and use the same away from the said messuage in any and every other place: that the said goods were delivered by the defendant to the vendees, and were, under and by means and in pursuance of such sale, removed and used away from the messuage, and were thereby dispersed by the defendant, so as to prevent their being followed or found, whereby the plaintiff was injured in her reversionary estate in the goods.

Third plea to the first count.—That defendant seized and took and sold, not in market overt, the said goods, and thereby converted and disposed thereof and dispersed the same, as and being and not otherwise than sheriff of the county where the grievances were committed, in the due execution by the defendant as such sheriff of a certain writ of execution, whereby he was commanded as such sheriff to seize and sell the goods and chattels of the said Sir Thomas Tancred in his bailiwick, to satisfy certain monies recovered against him, &c.; and that the plaintiff had not at the commencement of the suit sustained, and would not sustain, any damage by reason of the premises.


Demurrer and joinder.

Fifth plea.—A similar plea to the second count.

Demurrer and joinder.

*Phipson* argued for the plaintiff (May 4).—The plaintiff sues for injury to her reversionary interest. Not having been entitled to possession at the time of the alleged grievances, it is not a case in which trover would lie: *Gordon v. Harper* (a). It has been frequently intimated

(a) 7 T. R. 9.

1859.  
  
 TANCRED  
 v.  
 ALLGOOD.

1859.

~  
TANCRED  
v.  
ALLGOOD.

that in such a case as the present a special count is proper. In *Farrer v. Beswick* (a) a sheriff's officer had sold some horses, the joint property of the plaintiff and another, under a writ against the goods of the latter, and in the course of the argument, *Parke, B.*, observed (p. 685): "There is considerable doubt whether this is a conversion by the sheriff or only the subject of a special action on the case. When I was at the bar I used in these cases to declare in a special action on the case." If a tenant in common has a remedy, where his goods are sold by the sheriff under an execution against his co-tenant, a fortiori a reversioner can sue for the absolute sale of the property in an execution against the termor. *Mayhew v. Herrick* (b) exactly resembles this case, except in the circumstance that the bankrupt, whose assignees were the plaintiffs, was tenant in common with the person against whose goods the execution had issued. In that case there was a special count and also a count in trover. The plaintiffs proved that the defendant had taken the bankrupt's goods; the point was distinctly raised that the plaintiffs had a right of action against the sheriff in respect of the absolute sale by him of the bankrupt's undivided moiety in the goods, and it was held that they had. In *Archbold's Practice*, by Chitty, p. 606 (c), it is laid down that under a fi. fa. against one of two partners the sheriff may seize the goods of both, but can only sell the debtor's undivided moiety. [*Channell, B.*—I suppose the plaintiff relies upon the words in the declaration "well knowing the premises." In *Dean v. Whittaker* (d), it seems to have been assumed that the sheriff would be liable for selling too large an interest after notice. *Bramwell, B.*—Words alone do not give a cause of action. The sheriff who had a right to sell, did so; the act alone was lawful.] It is submitted

(a) 1 M. &amp; W. 682.

(b) 7 C. B. 229.

(c) 9th edition.

(d) 1 C. &amp; P. 347.

that it is not necessary for the plaintiff to rely on those words. In *Garland v. Carlisle* (a), it was held that the innocence of a sheriff, who sold without notice of a secret act of bankruptcy, did not protect him from liability in an action of trover. It was a tort to sell the absolute interest of the plaintiff, so as to prevent the goods being found and followed. Damage necessarily follows from that act. [*Martin*, B.—Is there any authority for saying that such an interest exists as a reversion in *goods*?] There may be a lease of goods. [*Pollock*, C. B.—In one sense there may, but that is not in the sense of a lease as applied to land.] There are many cases which recognize the position of lessor and lessee of goods: *Bradley v. Copley* (b), *Cooper v. Willomatt* (c), *Bryant v. Wardell* (d), *Fenn v. Bittleston* (e). [*Pollock*, C. B.—Is not the action brought too soon. Should not the plaintiff have waited until she sustained actual damage?] She is damaged already, viz. in her reversionary estate. [*Pollock*, C. B.—It seems contrary to the policy of the law, which abhors multiplicity of actions, that several persons should have distinct rights of action at the same time for injuries to a chattel. The case of land, no doubt, is different on account of the separate estates that may exist in it at the same time.] In *Jenkins v. Cook* (f), *Parke*, B., puts the case of a sheriff selling more than a tenant's interest, as an instance of injury to the reversion dating from the sale of the whole property. That case resembles the present. Suppose the case of a horse let to hire for a year; the owner dispossesses himself for that year; if the horse is shot is the owner to have no remedy for the value? He ought to have the full value. [*Pollock*, C. B.—No doubt he has a remedy if he is injured. But here the plea alleges that the plaintiff

1859.

TANCRED

v.  
ALLGOOD.

(a) 2 Cr. &amp; M. 31.

(b) 1 C. B. 685.

(c) 1 C. B. 672.

(d) 2 Exch. 479.

(e) 7 Exch. 152.

(f) 1 A. &amp; E. 375, note.

1850.  
 TANCRED  
 v.  
 ALLGOOD.

has sustained no injury. *Martin, B.*—What remains in the owner of goods who lets them for a time, is not analogous to the interest which remains in the owner of land who demises it for a term. In Co. Litt. it is said, that it is the duty of the bailee of goods to use them according to the intent of the bailment; using them improperly determines the bailment.] The interest remaining in one who lets goods to another is something more than matter of contract; though he parts with possession of the goods, he retains a certain interest though not a possessory interest. The owner of a house let for a month can sell it during the month (a). The buyer at the end of the month could enforce the delivery, though during the month he can maintain no action on the contract of hiring. But suppose a stranger injures the house during that time, can the buyer maintain no action against him? [*Pollock, C. B.*—Then, can the owner and the hirer both sue at the same time for the same thing? No doubt if an injury is done to a servant he can sue, as also can his master for loss of service.] Then, as to the damage, that clearly results from the absolute sale, by which it is alleged that the plaintiff is prevented from following and finding the goods.

*Blackburn*, for the defendant.—It may be conceded that if the goods had sustained any immediate injury the plaintiff would have a good cause of action. But it is submitted that the plea in effect amounts to not guilty, and negatives the existence of any cause of action. It states that the plaintiff neither has sustained, nor will sustain any damage. The argument on the other side is, that the fact so averred is impossible: damage to the plaintiff being the necessary result of the state of things alleged in the declaration and confessed by the plea. In truth, whether damage has or

(a) See *Franklin v. Neale*, 13 M. & W. 481.

has not been sustained is a question of fact. For instance, if a jewel had been seized and sold to a jeweller the plaintiff might obtain it again at the expiration of Sir T. Tancred's term. In *Owen v. Legh* (a), the defendant, who was the plaintiff's landlord, had distrained and sold growing crops before they were ripe; it was held that, the sale being altogether void, the plaintiff sustained no legal damage from it, and had therefore no ground of action in respect of it. In the present case the sale by the sheriff was simply void as to any thing beyond Sir Thomas Tancred's interest, and if so there is no damage to the plaintiff. As to the charge of eloigning and dispersing the goods; it is nevertheless possible that they may be found again and restored, and the possible case must be presumed. Unless the injury is necessarily permanent there can be no right of action. In *Hopwood v. Schofield* (b), *Patteson, J.*, asked, "How can an injury be called permanent which may be redressed in a few days?" [*Martin, B.*, referred to *Mumford v. The Oxford, Worcester and Wolverhampton Railway Company* (c).] It is true the removal of these goods may turn out to be an injury, but it may be none. The allegation that no damage will accrue is traversable; if the plaintiff had traversed it he would have raised a proper question for a jury: *Young v. Spencer* (d). [*Pollock, C. B.*—Where goods are let with a house the sheriff cannot sell them to be used elsewhere.] If he does, there may be a cause of action, provided the owner has a right of re-entry in such an event, but not otherwise.

*Phipson*, in reply.—The third plea admits that there has been an absolute sale so as to prevent the plaintiff finding the goods again; if so, damage to the plaintiff is inevitable. That distinguishes this case from *Owen v. Legh* (a). The

(a) 3 B. &amp; Ald. 470.

(b) 2 Moo. &amp; Rob. 34.

(c) 1 H. &amp; N. 34.

(d) 10 B. &amp; C. 145.

1859.  
 TANCRED  
 v.  
 ALLGOOD.

fifth plea admits a sale of the plaintiff's interest and of a right to use the goods in other places than those in which the tenant had a right to use them. That is a necessary damage, and there is no need of a proviso for re-entry, in the event of such user, to give a right of action to the plaintiff in respect of it. Damage to the plaintiff's title may be sufficient cause of action. There are many cases in which it is not necessary to prove actual damage: *Marzetti v. Williams* (a), *Fray v. Voules* (b).

*Cur. adv. vult.*

POLLOCK, C. B., now said:—In this case the damage sustained by the plaintiff is the whole foundation of the action. Probably any temporary damage done while the plaintiff's possession was suspended by her contract with another person, is not the foundation of an action. There is an allegation in the plea, which is confessed by the demurrer, that no damage has been sustained or could be sustained. We think, therefore, that the defendant is entitled to judgment on the demurrer to the plea to the first count. The second count does not shew or allege that, by reason of the use of the goods beyond the apparent licence to use them during the letting, there was a determination of the bailment so as to give the plaintiff a present right to the possession. To that count there was also a similar plea, and the same remark applies to that, viz. that the damage is the sole foundation of action upon the breach of the bailment. We are of opinion that the pleas are an answer to the cause of action as presented by the plaintiff in his declaration. Our judgment must therefore be for the defendant.

Judgment for the defendant (c).

(a) 1 B. & Adol. 415.

(b) Q. B. May 3, 1859.

(c) The argument was reported by J. A. Yonge, Esq.

1859.

## BAXENDALE and Others v. HARVEY.

April 19.

**A**SSUMPSIT on a policy of insurance effected by the plaintiffs in the Norwich Union Fire Insurance Society.—The declaration set out the policy, which stated that the plaintiffs, carriers, insured “30,000*l.* on live and dead stock and utensils in trade, and goods in transit in the plaintiffs’ warehouses, old and new offices, and stables, all adjoining and communicating, situate by the side of the canal at the Camden Town Station of the North Western Railway, brick and slate, having therein a cooking apparatus, three stoves securely fixed and a steam-engine of twelve horse power, the boiler of which was declared to be in a brick arched vault.” The declaration set out the terms and conditions indorsed on the policy, which were (amongst others) as follows:—

“3rd. Every policy issued by this Society will be void unless the nature and material structure of the buildings and property insured, and of all buildings which contain any part of the property insured, be fully and accurately described in such policy; and unless the trades carried on in all such buildings be correctly shewn; and unless it be

The plaintiffs had effected, with the Norwich Union Fire Insurance Society, a policy of insurance, which contained (amongst others) the following condition:—  
“Every policy issued by this Society will be void, unless the nature and material structure of the buildings and property insured, and of all buildings which contain any part of the property insured, be fully and accurately described in such policy, and unless the trades carried on in all such buildings be correctly shewn; and

unless it is stated in such policy whether any hazardous goods are deposited in any such buildings; and whether there be any stove or apparatus for producing heat (other than common fire places in private houses) used or employed in such buildings, or in any building, yard, or other place adjoining or near to the property insured, and belonging to or occupied by the party insured; and if there be any building of a hazardous nature or structure, or in which hazardous trades are carried on or hazardous goods deposited, belonging to or occupied by the party insured, adjoining or near to the property insured, the same must also be specified in the policy, or it will be void.”—The plaintiffs, who were carriers, in 1843, erected on the premises insured a steam-engine which they used for hoisting goods. This steam-engine was specified in the policy. The plaintiffs in 1844 applied the steam-engine to grinding provender for their horses. They attached to it a horizontal shaft, which was carried through the floor to an upper room where they erected winnowing and grinding machines. The policy was renewed in 1857. The Society had no knowledge of the erection of the additional machinery or that the steam-engine was used for grinding. The premises having been destroyed by fire:—*Held*, that the alteration did not avoid the policy, the jury having found that there was no increase of risk.

1859.  
BAXENDALE  
v.  
HARVEY.

stated in such policy whether any hazardous goods be deposited in any such buildings; and whether there be any stove or apparatus for producing heat (other than common fire places in private houses) used or employed in any such buildings, or in any building, yard, or other place adjoining or near to the property insured, and belonging to or occupied by the party insured; and if there be any building of a hazardous nature or structure, or in which hazardous trades are carried on or hazardous goods deposited, belonging to or occupied by the party insured, adjoining or near to the property insured, the same must also be specified in the policy, or it will be void."

"4th. If any alteration or addition be made in, or to any building insured, or in which any insured property is contained, or in, or to any building adjoining, or near to the property insured, belonging to or occupied by the party insured, by which the risk of fire, to which the building or property insured, or the building containing such property, is, or may be exposed, be increased; or if such risk be increased either by any of the means adverted to in the third condition, or in any other manner; or if any property insured be removed into other premises, such alteration or addition, increase of risk, or removal, must be immediately notified to the Society in order to its being allowed by indorsement on the policy, such indorsement being signed by one of the Society's secretaries or agents, otherwise the policy will be void."

The declaration contained the usual averments, that the plaintiffs were interested in the property insured and had paid the annual premium; and it alleged that the said stock, utensils in trade, and goods in transit in the policy mentioned were destroyed by fire; and that all things had been done and happened, &c., to entitle the plaintiffs to be paid the amount of their loss.—Breach: Nonpayment.


Pleas (inter alia).—Sixth : That the nature and material structure of the buildings and property insured, and of the buildings which contained the property insured by the said policy, were not nor are fully and accurately described in the said policy as required by the third condition indorsed on the policy, in this, that manufactories, processes, and trades, attended with peculiar danger, were carried on in and upon the said buildings and property insured, and in and upon the said buildings containing the property insured, which manufactories, processes, and trades were not, nor was any of them mentioned or described or noticed in the said policy ; and the defendant says that he did not accept or assent to the description, statement, and specification contained in the said policy as a complete and sufficient compliance with the said third condition thereon indorsed : whereby the said policy was and is void.

Seventh.—That the said property insured, and the buildings containing such property, and the risk to be insured against, were not duly described in the said policy ; but the same were described in the said policy otherwise than they really were, and so as to cause the said insurance to be effected, and the same was effected, at a lower premium than it otherwise would and ought to have been. And the defendant says that he did not accept or assent to the description, statement, and specification contained in the said policy as complete and sufficient compliance with the said third condition indorsed on the said policy, or as a true, correct or adequate description of the said property insured, and the buildings containing the same, and of the risk to be insured against : whereby the said policy was and is void.

Replications taking issue on the pleas.

At the trial, before *Pollock*, C. B., at the London Sittings after last Hilary Term, it appeared that the plaintiffs, who

1859.

  
BAXENDALE  
v.  
HARVEY.

were carriers, had for many years effected insurances with the Norwich Union Fire Insurance Society, of which the defendant was a director. In the year 1843, the plaintiffs erected, in a vault on the premises insured, a steam-engine of twelve horse power, which they used solely for working cranes in hoisting in goods to their carrier's warehouse. The Insurance Society had notice of this steam-engine and the purpose for which it was used; and in consequence they increased the premium from 2*s.* 6*d.* to 4*s.* 6*d.* per cent. In the year 1844, the plaintiffs used the steam-engine for grinding provender for their horses. They attached to it a horizontal shaft which was carried through the floor to an upper room where they erected winnowing machines, and machines for crushing oats, splitting beans, &c. The Society had no knowledge of the additional machinery, or that the steam-engine was used for any other purpose than that of hoisting, until after the fire took place. The policy on which this action was brought was effected in July 1857, and it appeared that there were different classes of insurance at different rates of premium.

It was submitted, on the part of the defendant, that there was a misdescription of the risk at the time the policy was granted. The learned Judge left the following questions to the jury:—First, had the Insurance Society notice that the steam-engine was put up for purposes more general than hoisting? Secondly, was the use of the steam-engine unreasonable, or such as the Society might have expected from its being put up for other purposes? Thirdly, was the steam-engine used for other purposes than for the plaintiffs' establishment? Fourthly, had the Society notice of the particular use to which the steam-engine had been applied? Fifthly, did the particular use to which the steam-engine was applied increase the risk beyond what might be expected from its being used for general purposes? Lastly, was the

risk correctly described in the policy. The jury found the first and last questions in the affirmative, and all the others in the negative; whereupon his Lordship directed a verdict for the plaintiffs, reserving leave to the defendants to move to enter the verdict for them.

1859.  
BAXENDALE  
v.  
HARVEY.

*Lush* now moved to enter the verdict for the defendants, or for a new trial on the ground of misdirection and that the verdict was against the evidence.—There was either a misdescription of the steam-engine or a misdescription of the building insured, and therefore the policy is void by the third and fourth conditions. When the steam-engine was first erected it was used solely for the purpose of hoisting, but its application to the purposes of grinding, together with the erection of additional machinery, increased the risk. [*Pollock*, C. B.—‘This is a mere increase of danger. It is like the case of a person who has an oven on his premises, and instead of using it for baking bread he uses it for some other purpose. If a person who insures his life goes up in a balloon, that does not vitiate his policy.’] Here there is an increase in the nature of the risk, not in degree only.

MARTIN, B.—I am of opinion that there ought to be no rule. The plaintiffs erected on the premises insured a steam-engine which they then used for hoisting only. They afterwards applied it to the purpose of providing food for their horses; so that it was used for something essential to their business as carriers. The question is whether such a use of the steam-engine vitiates the policy. By the third condition, “Every policy issued by this Society will be void, unless the nature and material structure of the buildings and property insured be fully and accurately described in such policy.” In my opinion the machinery attached to this steam-engine was not a part of the nature and material

1859.

**BAXENDALE**  
v.  
**HARVEY.**

structure of the building and property insured. The condition also says, "and of all buildings which contain any part of the property insured." This is not the case of a building; it is an operation carried on in a building, by which the plaintiffs provide food for their horses. The condition also says, "and if there be any building of a hazardous nature or structure, or in which hazardous trades are carried on, or hazardous goods deposited, the same must also be specified in the policy." It was a question for the jury whether the operation which the plaintiffs carried on, and which was necessary for their trade as carriers, so increased the risk as to be of a hazardous nature, and they have found it did not. Therefore, the case not being within the third condition, it was not necessary under the fourth condition for the plaintiffs to give notice that they had applied the steam-engine to the purposes of grinding. *Stokes v. Cox (a)* is an authority that, if the insurers wish to make it a condition precedent to the validity of the policy that there shall be no alteration in the circumstances, whether the risk is increased or not, they must do so in distinct terms.

BRAMWELL, B.—I am of the same opinion. It is argued that the policy is subject to certain conditions which the plaintiffs have not complied with. The third condition requires the nature and material structure of the buildings and property insured to be fully and accurately described in the policy. Then the question is whether there has been any want of a full and accurate description of them. The buildings had in them a steam-engine which was described in the policy. This steam-engine was formerly used for hoisting, but afterwards some machinery was added to it and it was used for grinding food for horses. Then, does that circumstance render the description, which would other-

(a) 1 H. & N. 533.

wise be accurate one that is not so. In my opinion it does not. The "nature and material structure of the buildings" whether they are built of stone, brick or wood ; or whether they are tiled, slated or thatched. The term manifestly refers to what may be called the essence of the building and not to its incidents. There is no condition making it obligatory on the insured to describe every alteration in the machinery in the buildings.

1859.  
BAXENDALE  
v.  
HARVEY.

CHANNELL, B.—I am also of opinion that there ought to be no rule. It is said that there are conditions in the policy which, not being complied with, render it void. The question is whether, under the third condition, this machinery is a part of "the nature and material structure of the buildings insured." In my opinion it is not. What is meant is, whatever be the nature and structure of the buildings, whether built of stone, brick or wood, or covered with slate or tiles, they must be accurately described. I do not think this machinery can be considered as part of the nature or structure of the buildings. That being the construction of the third condition, the fourth does not carry the argument any further.

POLLOCK, C. B.—I agree that there ought to be no rule. In cases of insurance the Courts ought to give every facility to the detection of fraud ; but where the transaction is bonâ fide, it is the duty of the insurers to establish their objection free from doubt. In this case the Society had notice that the steam-engine was on the premises, and that it was employed for a particular purpose ; but their objection is that it was afterwards employed for another purpose, which they did not know of or anticipate, and which increased the danger. The answer is, that the Society allowed the erection of the steam-engine without any qualification whatever

1859.

BAXENDALE  
v.  
HARVEY.

as to its purpose; and if they meant it to be confined to the one use, they should have stipulated that it should be used for the purpose of hoisting only. The jury found that there was no increase of risk by using the steam-engine for grinding, and the Society having had notice of the nature of the risk were not entitled to any notice by reason of the increase of danger. A person who insures may light as many candles as he please in his house, though each additional candle increases the danger of setting the house on fire.

Rule refused.

May 12.

In re WILLIAM CORBETT, an Insolvent Debtor.

An insolvent filed his petition in a County Court and obtained an order for protection from process until the day appointed for his first examination. On that day his attorney applied to the County Court judge for leave to withdraw the petition, on the ground that the date on which it was presented did not appear upon it. The application was opposed by several creditors, and the County Court judge refused it, and adjourned the

*H. JAMES* had obtained a rule calling on the judge of the County Court of Gloucestershire, holden at Newnham, to shew cause why the petition filed by W. Corbett should not be removed from the file, or why it should not be dismissed, or why the judge should not name a day for hearing such petition and grant protection until such petition be heard.

It appeared from the affidavits that, on the 22nd February last, the insolvent filed a petition in the County Court of Gloucestershire, holden at Newnham, under the 5 & 6 Vict. c. 116 and the 7 & 8 Vict. c. 96; and thereupon obtained an interim order for protection from process until the 20th April, the day appointed for the first examination. The date on which the petition was presented did not appear on the face of it. On the 20th of April the insolvent's attorney attended the Court, and applied to the judge for leave to withdraw the petition and file a new

examination of the insolvent *sine die*. — *Held*, that the County Court judge having adjudicated upon the matter, this Court had no power, under the 19 & 20 Vict. c. 108, s. 43, to order him to remove the petition from the file, or dismiss it, or name a day for the hearing.

petition. This was opposed by several creditors, and the judge refused the application and adjourned the examination of the insolvent sine die, without protection.

1859.

IN RE  
CORBETT.

*J. J. Powell* shewed cause.—The application is made under the 43rd section of the 19 & 20 Vict. c. 108, which enacts that “no writ of mandamus shall henceforth issue to a judge or an officer of the County Court for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to any superior Court (a), upon an affidavit of the facts, for a rule calling upon such judge or officer of a County Court, and also the party to be affected by such act, to shew cause why such act should not be done” &c. The only effect of that enactment is to substitute the proceeding by rule of Court for the old remedy by mandamus, and is only available in cases where a mandamus would lie. Here the County Court judge had adjudicated on the matter, and it is not competent to this Court to review his decision: *Ex parte Partington* (b). The petition is in the form promulgated by the Commissioners, and it is not necessary that the date when it was presented should appear on the face of it.—He also produced an affidavit that within three months before the filing of the petition the insolvent had paid a large sum of money to particular creditors, and he argued that, under these circumstances, the County Court judge was right in adjourning the matter sine die. He referred to the 7 & 8 Vict. c. 96, s. 19, and 5 & 6 Vict. c. 116, s. 4.

*H. James*, in support of the rule.—The jurisdiction of the County Court judges in cases of insolvency depends on the 10 & 11 Vict. c. 102, s. 6, which requires that the

(a) The power given by this section to a judge is repealed by the 21 & 22 Vict. c. 74, s. 4. (b) 6 Q. B. 649. S. C. 13 M. & W. 679.

1859.  
IN RE  
CORBETT.

petitioner shall have resided within the County Court district for six calendar months immediately preceding the day of the filing of his petition. The date of the petition ought therefore to appear on the face of it in order to give the Court jurisdiction.—He also argued that the County Court judge had no power to adjourn the petition *sine die*, but only from time to time. Upon this point he referred to the 7 & 8 Vict. c. 96.

POLLOCK, C. B.—We are all of opinion that the rule must be discharged. In this matter the County Court judge acted judicially, and if we were to grant this application it would be making this Court a Court of appeal from his decision.

MARTIN, B.—I am of the same opinion. When the rule was moved it was alleged that there was some statutory defect in the petition; but that is not so. Therefore, a proper petition having been filed, it cannot be removed from the file without there is some ground for so doing. The County Court judge must decide whether it is necessary that he should exercise his authority in that respect; and if we were to make this rule absolute we should be making this Court a Court of appeal against his decision. He acted judicially, and if he was wrong we have no power to set him right.

BRAMWELL, B.—I am of the same opinion. We are not called upon to direct the County Court judge to do any act which he was bound to do, but to interfere in a matter upon which he has exercised his judgment. That we have no power to do.

Rule discharged.

1859.

HICKIE and BORMAN v. RODOCANACHI.

May 12.

**T**HIS cause came on to be tried at the London sittings after Michaelmas Term, when a verdict was found for the plaintiffs, subject to a special case in substance as follows.

The first count is on a policy of insurance on the hull and machinery of the steam ship "Sarah Sands" for twelve calendar months from the 13th of August, 1857, to the 12th of August, 1858, both days inclusive. The interest insured was by the policy declared to be valued at and upon 1200*l.* on hull and machinery, valued at 20,000*l.* The perils insured against are the ordinary perils of a marine insurance, the premium being at the rate of 9*l.* 9*s.* per cent., to return 15*s.* for every uncommenced month for cancelling the policy. The count alleges that the defendant underwrote the policy for 100*l.*; that the plaintiffs and G. A. Lloyd, some or one of them, were interested, and that during the twelve months covered by the policy the ship, her hull and machinery were lost by the perils insured against.—Second count, for money had and received and on an account stated. The defendant paid into Court 83*l.* 10*s.*, and pleaded that that sum was sufficient to satisfy the claim of the plaintiffs.

The replication traversed the plea.

The particulars claimed a return of premium for the uncommenced months.

On the 7th of August, 1857, an agreement was made between John Squire Castle, master of the steam ship "Sarah Sands," then about to proceed from Portsmouth to Calcutta, of the one part, and the East India Company of the other part, whereby J. S. Castle covenanted with the Company to take on board and convey to Calcutta not exceeding 504 soldiers, &c., and the said Company cove-

A ship having been chartered to carry troops to Calcutta, by a charter-party, under which a portion of the freight was made payable on the completion of the voyage, when about 700 miles beyond the Mauritius caught fire. The ship put back to the Mauritius, where, being found to be greatly damaged, she was abandoned to the underwriters as totally lost, and the abandonment was accepted. The captain having chartered another ship and forwarded the troops to Calcutta, the freight was received by the shipowner's agents.—*Held*, that in forwarding the troops the captain acted as agent for the owner, and not for the underwriters; and that the underwriters, to whom the ship had been abandoned, were not entitled to any benefit from the freight so received.

1859.  
HICKIE  
v.  
RODOCANACHI

nanted with J. S. Castle to pay him 40*l.* for each soldier, &c., one third to be paid within fourteen days after the ship's final departure from Portsmouth, and the remaining two thirds within twenty-one days after the disembarkation of the soldiers at Calcutta. (Then followed provisions relating to the officers, &c.) It was further agreed that if the ship should not be ready to receive the soldiers by the 8th of August the Company might deduct from the passage money 10*l.* per day, Sundays excepted; and that, in the event of her not reaching Calcutta on or before the 70th day after she should be dispatched from Portsmouth, from any cause other than from accidents of the seas, the Company should be allowed to deduct from the passage money payable in the East Indies 30*l.* per day for each day between the 70th day and the day of the ship's actual arrival at Calcutta.

Before the making of the agreement, C. Walton & Son, as agents for the shipowner, effected an insurance on the ship from the 7th of August, 1857, to the 6th of August, 1858, both days inclusive; the interest being declared to be valued at 15,000*l.* on hull and machinery valued at 20,000*l.* The policy was underwritten by several persons, for sums amounting to 15,000*l.*

After the making of the agreement, the plaintiffs, as agents of the shipowner, effected the insurance on the ship which is stated in the first count, the interest being declared to be 1200*l.* on hull and machinery valued at 20,000*l.* This policy was, on the 1st of September, 1857, underwritten by the defendant for 100*l.*, and by other persons in other sums, making together 1200*l.*

After the making of the agreement, the agents of the shipowner effected insurances on the freight at and from London to Portsmouth and from thence to Calcutta, the interest being declared to be valued at 3450*l.* and 11,000*l.* on chartered freight valued at 14,500*l.*

On the 16th of August the ship took on board at Portsmouth 14 officers and 355 men, besides women and children; and on that day she sailed.

Accounts were rendered, and the East India Company paid to the agents of the shipowner, on account of the one-third freight, &c., 7640*l*.

The ship proceeded on her voyage to Calcutta, and on the 11th of November, 1857, being about 700 miles to the north-east of the Mauritius, caught fire. Having sustained great damage, she was with difficulty brought back to the Mauritius, where she arrived on the 23rd of the same month, when the crew, with the officers, troops, &c., were safely landed.

The master having caused surveys to be made to ascertain the amount of injury to the ship, and whether she could be repaired, either at the Mauritius or elsewhere, and at what cost, it was found that the ship could not be effectually repaired at the Mauritius, and that the costs of her repairs would far exceed the value of the ship when repaired. He accordingly, on the 9th of January, 1858, caused a protest to be drawn up and notice of abandonment to be sent to the plaintiffs, who received it on the 12th of February, 1858.

On the 17th of February the plaintiffs gave notice of abandonment to the underwriters on the hull and machinery, and claimed as for a total loss. The defendant accepted the abandonment.

On the 5th of December the said John Squire Castle chartered a steam ship called the "Clarendon" to convey the troops to Calcutta, at a freight of 6197*l*. 18*s*. 4*d*., which was paid by the East India Company to the owners of the "Clarendon" and deducted from the payment hereinafter mentioned to be made to Turner, Cadogan & Co. after the arrival of the passengers in India. On the 20th of December the troops embarked on board the "Clarendon," and on

1859.  
HICKIN  
v.  
RODOCANACHI

1859.  
 {  
 HICKIE  
 v.  
 RODOCANACHI

the 22nd of January the "Clarendon" arrived at Calcutta. The agents of the shipowner in India then sent in an account, claiming of the East India Company 10,183*l.* 6*s.* 8*d.*, and ultimately received from them 2201*l.* 5*s.*; the East India Company having deducted, amongst other things, 6917*l.* 18*s.* 4*d.*, freight paid to the master of the "Clarendon," and 1500*l.* for the detention of the troops beyond the 70 days stipulated by the charterers. The agents remitted the balance of the account, 2066*l.* 1*s.* 9*d.*, to the assured on the 3rd of May, 1858.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover from the defendant anything beyond the 83*l.* 10*s.* (*a*) paid into Court. If the plaintiffs are so entitled, judgment is to be entered for the plaintiffs; if not, for the defendant, with costs.

*Bovill* argued for the plaintiffs (*b*).—The defendant's contention is, that when an insured ship has been totally lost and abandoned to the underwriters, and the abandonment accepted, the captain having forwarded the cargo in another vessel, the underwriters are entitled to the freight

(*a*) The manner in which this sum was calculated was as follows:—

|                                              |      |    |    |
|----------------------------------------------|------|----|----|
| Deductions claimed by the defendant—         | £    | s. | d. |
| Amount remitted by Turner, Cadogan & Co.     | 2066 | 1  | 9  |
| Demurrage deducted by the East India Company | 1500 | 0  | 0  |

|                                                |      |   |   |
|------------------------------------------------|------|---|---|
| Total profit of carrying on the soldiers . . . | 3566 | 1 | 9 |
|------------------------------------------------|------|---|---|

Then as 20,000*l.*, the value of the ship declared in the policy, is to 3566*l.* 1*s.* 9*d.*, so is 100*l.*, the defendant's subscription, to 17*l.* 16*s.* 7*d.*

|                                                                                                      |     |    |    |
|------------------------------------------------------------------------------------------------------|-----|----|----|
| Deduct 17 <i>l.</i> 16 <i>s.</i> 7 <i>d.</i> from 100 <i>l.</i> , defendant's subscription . . . . . | £   | s. | d. |
| Interest on ditto till June 30, 1858 . . . . .                                                       | 82  | 3  | 5  |
|                                                                                                      |     | 19 | 4  |
| Total . . . . .                                                                                      | £83 | 2  | 9  |

|                                     |     |    |   |
|-------------------------------------|-----|----|---|
| Total sum paid into Court . . . . . | £83 | 10 | 0 |
|-------------------------------------|-----|----|---|

(*b*) May 4. Before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Channell*, B.

for the whole voyage, minus the hire of the substituted vessel. The plaintiffs' contention is, that in forwarding the soldiers to their destination the captain was acting as agent for the owner, and not for the underwriters on the ship. In *Phillips on Insurance*, s. 1739, it is said, "If the original ship becomes innavigable, and is abandoned to the underwriters, and the cargo is forwarded to the port of destination by another at less than the freight originally agreed on for the whole voyage, whereby freight pro rata is saved for the part of the voyage performed by the original ship, such pro rata freight (*a*) does not go as salvage with the ship either in England or in the United States, but belongs to the shipowner, or goes as salvage to the underwriters on freight." The abandonment is an abandonment of the ship, not of freight actually earned or to be earned. The underwriter on the ship has nothing to do with forwarding the cargo. If the owner chooses to hire a fresh ship he has a right to tack that service to the imperfect service on the old ship, and so earn the whole freight. [*Martin*, B.—If the shipowner can carry on the goods in the same ship he is bound to do so; if he cannot he is entitled to tranship the goods and carry them on. But he is not bound to tranship: *Gibbs v. Grey* (*b*). *Pollock*, C. B.—If a ship having goods on board, for which a large freight might become payable, were sold, the value of the freight would be considered, because no one could get the goods out of the vessel except on payment of the freight. In that sense only the freight may be said to be incident to the ship]. If a person insures a ship he insures the value of the ship only; ship and freight being well known separate subjects of insurance. Many cases on the subject of the right of the abandonee of the ship to the freight arose

1859.

HICKIE

v.

RODOCANACHI

(a) i. e. Freight earned prior to the loss.

(b) 2 H. &amp; N. 22.

1859.

HICKIE

v.

RODOCANACHI

about the year 1800 with reference to the Russian embargo. In *Thompson v. Rowcroft* (a), the ship having been seized by the Russian government was abandoned, and a total loss paid by the underwriters on ship and also by the underwriters on the freight, on the shipowner undertaking to assign to the underwriters on freight "all right of recovery and compensation of and in the freight." The cargo was put on board again and the ship earned its freight. Lord *Ellenborough* said, "If the rights of the respective underwriters on the ship and on the freight had clashed, and if it had been a question of priority between the two who were litigating for payment out of the same fund, I should have gone with the defendant's counsel in a great part of their argument" (viz. that the underwriter on the ship was entitled to the freight). In *Sharp v. Gladstone* (b), Lord *Ellenborough* observed, "that he felt great difficulty in saying that, after an abandonment of the ship by the owner to the underwriters on ship, he could abandon the freight, which seemed to follow the property in the ship, *being the earnings made by the subsequent use of that which was then become the property of others*, to another set of underwriters." In *McCarthy v. Abel* (c) it was argued that on abandonment the underwriter took the ship subject to all existing contracts which bound the owner in respect of it at the time of the abandonment; but Lord *Ellenborough* ridiculed the notion of a contract running with a chattel. He put the case of a man purchasing a waggon as it is going on the road loaded with goods, and asked if the purchaser was bound to carry the goods to the journey's end, though the carrier, the vendor, who had contracted to do so would be liable on his contract. Lord *Ellenborough*, in *Case v. Davidson* (d), thus explains the principle upon which these

(a) 4 East, 34.

(b) 7 East, 24. See p. 30.

(c) 5 East, 388. 393.

(d) 5 M. &amp; Sel. 79; S C. in error, 2 Brod. &amp; Bing. 379.

cases rest: "Freight follows, as an incident, the property in the ship, and therefore, as between the respective underwriters on ship and freight, an abandonment of the ship carries the freight along with it. \* \* \* "The underwriter, indeed, does not become privy, by virtue of such abandonment, to any existing charter-party, nor perhaps to any contract of affreightment before made with the owner; but I think that by the abandonment he acquires possession of the thing from the use of which freight is to be earned. \* \* \* An abandonment to the underwriter on ship transfers to him not merely the hull, but the use of the ship, and the advantages resulting from the completion of the voyage." In *Arnould on Insurance*, p. 1151 (a), it is said, "The freight transferred by the abandonment is the whole freight pending at the time of the casualty which gave occasion to the abandonment, *and ultimately earned by the ship.*" *Case v. Davidson* (b) is no authority, that after abandonment the underwriter has any thing to do with the cargo. The captain is the agent of necessity for all parties concerned; but the underwriter on ship has nothing to do with the cargo, and therefore the captain is not his agent in respect to it. In *Benson v. Chapman* (c), where there was a constructive total loss, it was held that the master, in causing the ship to be repaired which the owner afterwards abandoned, acted as the agent of the owner. In *The Scottish Marine Insurance Company v. Turner* (d) it was said, by Lord Truro, "that the act of abandonment, if it did not operate as an assignment of the ship, at least enured as a binding agreement to assign it, and thereby vested the insurers of the ship with all the rights which belonged to the owners; among which rights was that of

1859.

HICKIE  
v.  
RODOCANACHI

(a) 2nd edition.

(c) 2 H. L. 696.

(b) 5 M. &amp; Sel. 79; S. C. in error, 2 Brod. &amp; Bing. 379.

(d) 1 Macqueen, 334. 342.

1859.  
 ~~~~~  
 HICKIE  
 v.  
 RODOCANACHI

having the benefit of the earnings of the ship during the voyage." In *Stewart v. The Greenock Marine Insurance Company* (a) the same ship went on. *Miller v. Woodfall* (b) was decided on a similar principle. In any case the defendants are not bound to allow the deductions claimed by the East India Company for demurrage. [*Blackburn* abandoned the point.] The plaintiff is entitled to a return of premium for risk not incurred (c).

*Blackburn* (with whom was *Wilde*), for the defendant.—It is now settled that a conveyance of a ship transfers all the incidents belonging to it, and amongst other things freight in course of being earned. Then, if the ship be disabled, the freight may be earned by a substituted ship, according to the Law Merchant. The beneficial interest in the freight passing to the abandonee of the ship, this right, which is incident to the freight, passed to him also. After the abandonment the captain became agent for the underwriters on the ship, having on their behalf the option to repair the ship, or otherwise carry on the cargo and earn the freight, or to give up the freight. In hiring a fresh ship, in order to forward the cargo and earn the freight, the captain was therefore acting as agent for the underwriters. [*Pollock*, C. B.—Suppose the owner, not being insured, had sold the ship, might he not have carried on the cargo in another vessel?] The law of England, as to the effect of abandonment, differs from that of America. Phillips on Insurance is an American work, and the case of *Luke v. Lyde* (d), cited as an authority for the proposition in section 1739, relied upon by the other side, does not bear it out. In *Stewart v. The Greenock*

(a) 1 Macqueen, 328. 331; See *Langhorn v. Albright*, 4 Taunt. S. C., 2 H. L. Cas. 159. 511.

(b) 8 E. & B. 493.

(d) 2 Burr. 882.

(c) This point was not pressed.

*Marine Assurance Company* (a) the point now contended for was treated by Lord Cottenham as established. The question having been much discussed in the earlier cases, which have been referred to on the other side, in *Case v. Davidson* (b) it was decided that on abandonment the underwriter on ship became entitled to the accruing freight. The judgment proceeds upon the principle that the underwriter is entitled to all the advantages incident to the ship. *Abbott, J.*, says (c), "Now this is a principle clearly established, that if the ship be sold the vendee is entitled to the freight as an incident to the ship. And on that principle I found my judgment in this case, being of opinion that an abandonment is equivalent to a sale of the ship." *Holroyd, J.*, says (d), "It follows, as a consequence of abandoning the ship, that the owner divests himself of his right to freight which is incident to the ship, and the same becomes vested in the abandonee." *Miller v. Woodfall* (e) has no bearing on the present case. The plaintiffs' counsel attempted to argue that profits were equivalent to freight, and the Court decided that at the time of the casualty there was no freight pending. Lord Campbell, however, pointed out that, by the English law, the abandonee of the ship has a right to the whole of the freight pending at the time of the casualty. If it be asked who is the person who has a right to complete the contract under the charter-party, the answer is, *primâ facie*, the party who made it; but the cession of the shipowner's property is a cession of all his rights in respect of it. The contract of the underwriter is one of indemnity; when the indemnity has been fulfilled, the underwriter, as the party indemnifying, is entitled to the benefit of any

1859.

HICKIE

v.  
RODOCANACHI

(a) 1 Macqueen, 328. 331;  
S. C., 2 H. L. Cas. 159.

(b) 5 M. & Sel. 79; S. C. in  
error, 2 Brod. & Bing. 379.

(c) Page 87.

(d) Page 89.

(e) 8 E. & B. 493.

1859.

HICBIE

v.

RODOCANACHI

collateral rights against other persons, which diminish the loss. If the "Sarah Sands" had been sunk in consequence of a collision, the underwriter would have been entitled to the benefit of any damages recovered. If a fire is occasioned by rioters, an insurer is entitled to the damages to be recovered against the hundred. In the present case the underwriter is entitled, not merely to the hull, but to the right to carry on the cargo, as a collateral right. The owner of a cargo could not have taken it out of the vessel without paying the full freight. [*Martin*, B.—Might not the owner of goods, if present, have said: I am content that the ship owner may carry on the cargo, but not the underwriter, with whom I have no contract?] Where there is no opportunity of consulting the owner of the goods, all the authorities agree that the master is at liberty to forward the goods by another ship: *Shipton v. Thornton* (a). That is a right which he has as agent for the owner of the abandoned ship. In the present case, after the "Sarah Sands" had become the property of the defendant by the abandonment, the cargo was carried seven hundred miles by the defendant's ship before the transhipment. [*Martin*, B.—*Miller v. Woodfall* (b) is an authority, that the defendant would be entitled to compensation for that service in an action for work and labour.]

*Bovill*, in reply.—It is clear from *Shipton v. Thornton* (a), that the right or duty of the shipowner, and of the master as his agent, to convey the goods to their place of destination, arises out of the contract; therefore, in forwarding the goods, he acts as the agent of the shipowner, and not of the underwriter, who has nothing to do with the contract. The defendants acquired no right to the *freight* by reason of the ultimate conveyance of the troops to their destination.

(a) 9 A. &amp; E. 314.

(b) 8 E. &amp; B. 493.

Freight does not accrue till the goods are actually delivered:  
*Cato v. Irving* (a).

*Cur. adv. vult.*

1859.  
 HICKIE  
 v.  
 RODOCANACHI

The judgment of the Court was now delivered by

BRAMWELL, B.—In this case the material facts are as follows:—The plaintiffs were the owners of a ship, the “Sarah Sands,” which they chartered for a voyage to carry troops to Calcutta. By the charter-party, a portion of the freight was payable only on the completion of the voyage, so that the plaintiffs’ right to it depended on that event. The vessel sailed, and when 700 miles beyond the Mauritius took fire, and was compelled to desist from the prosecution of the voyage, and made for the Mauritius, which she reached, having sustained great damage. She was insured by a marine policy, in the common form. On notice of the loss, the insured abandoned, and the abandonment was accepted. The captain freighted another ship; the troops were forwarded to Calcutta; the freight earned and received by the insured. This action is brought on the policy, and the question is, if the underwriters are entitled to the benefit of the freight so earned. The case was very ably argued on both sides before us on the 4th of May, when Mr. *Blackburn*, for the defendant, claimed that benefit as a matter of principle as well as of authority. He said that a contract of insurance was one of indemnity; that an insurer was in the nature of a surety, and entitled to the benefit of all the securities the insured possessed. But, in truth, this argument tells against him. The common insurance on a ship is in no way concerned with the freight in course of being earned. It is an insurance on the absolute value, not on that and the vessel’s adventitious advantages. If

(a) 5 De Gex & Smale, 210. 224. .

1859.  
HICKIE  
v.  
RODOCANACHI

any question of the value of the ship arose, the insured could not include the freight as an item in the calculation, any more than he could the prospect of winning a wager which he had made, that she would arrive at her port of destination. It is the *goods*, not the *ship*, which are increased in value by the arrival of the ship, or rather *their* arrival, and if they arrive the freight is earned. But the matter needs no argument; it is enough to refer to the practice of separate insurance on freight. If, then, the loss of freight is no part of the loss in the loss of the ship, consequently the insurer of ship ought to have no benefit from the earning of freight unless he helps to earn it. This argument therefore fails. But Mr. *Blackburn* cited cases to shew, and indeed it was admitted, that there are cases in which the underwriter on ship does get a benefit from the freight earned. But in all these cases the freight was earned *by the insured ship*, and the underwriters had the benefit thereof, on the ground that, by the abandonment, the property in the insured ship vested in the underwriters from the time of the loss, and, consequently, it was *their ship* that earned the freight, and the principle which entitles the purchaser of a ship to freight which it earns after the purchase was applied, the underwriters being treated as such purchasers. Whether this is a just or equitable rule, whether that which prevails in America is not more fair, or whether even that might not be improved on, it is unnecessary to consider. The mercantile community may alter it by their contracts if they think fit; it exists and is the law, but does not govern this case, being founded solely on the ownership by the underwriters of the abandoned ship. With one exception, all the authorities give this as the reason in terms which negative the claim made by the defendant in this case. It is needless to refer to them.

But there is one expression of opinion the other way, to

which every respect is due. In *Stewart v. The Greenock Marine Insurance Company* (a) Lord Cottenham said: "The case is the same as it would have been if the ship had ceased to exist, as such, on the 27th of July, and the cargo had been brought home and delivered by other means." Now that undoubtedly assumes that in the case of freight earned by goods being carried on in a fresh ship, after a loss of that insured, the underwriters on the latter are entitled to the freight earned. But it is to be observed that that was not the matter to be there determined, nor even that on which the speaker's mind was engaged. All Lord Cottenham was establishing was that the loss was a loss during the voyage as much as though it had occurred fifteen days before the vessel reached the docks. It seems to us therefore that the arguments and authorities fail to establish the defendant's claim, and we think it can be shewn that on principle that claim is ill-founded. Where the injured ship finishes the voyage, it is the ship of the underwriters; and those who make use of it may not altogether unreasonably be held to do so for the benefit of its then owners. But where another ship finishes the voyage, it is not the underwriters' ship, and there is no reason why those who hire it should be supposed to be acting for the benefit of the underwriters, rather than for their own employers, the former owners. Here the captain, when he hired the new vessel, was not the underwriters' captain nor their agent, nor under any duty to them; he was to his former owners. Take the case put in the argument. Suppose the plaintiffs and the defendant had been at the Mauritius and each had claimed to forward the troops for his own benefit, who would have been entitled to do so? Undoubtedly the plaintiffs. Take the other case of there being a breach of duty to the charterer in not

1859.

HICKIE

v.

RODOCANACHI

(a) 1 Macqueen, 328.

1859.  
 HICKIE  
 v.  
 RODOCANACHI

forwarding the troops, who would have been liable? The plaintiffs, not the defendant. Again, suppose the hire and cost of the new ship exceeded the freight earned, who would be liable for it? The plaintiffs, not the defendant. Or suppose the case of the owner of the goods arriving at the Mauritius, and insisting on the goods being there delivered to him, in which case he must pay the whole freight, surely the owner would be entitled to it.

On these grounds we are satisfied that the captain, in such a case as the present, acts for the owners of the ship, and not for the underwriters; and that they are not entitled to any benefit from the freight acquired: that the underwriters may indeed be entitled to advantages attached to the ship, but not to those arising from contracts the fulfilment of which can be, and is, detached from the ship. We therefore give judgment for the plaintiffs.

Judgment for the plaintiffs.

May 3.

STILWELL and Another v. RUCK.

There is no general rule that the costs of inspection of documents must be borne by the party seeking it, and that the costs of obtaining an order for the inspection are costs in the cause; but the Court will in its discretion order both the costs of the application and inspection to be, in any event, the costs in the cause of the party called upon to grant the inspection.

THIS was an action by the keeper of a lunatic asylum to recover from the defendant the charges for his maintenance whilst an inmate of the asylum.

*Edwin James* moved (April 21) for a rule calling on the plaintiffs to shew cause why the defendant should not be at liberty to inspect and take copies of the following books and documents, viz., "The book of Entries of Removal and Discharge of patients from the asylum," required to be kept by section 54 of the 8 & 9 Vict. c. 100, "The Medical

Visitation Book" (s. 59), "The Case Book" (s. 60), "The Visitors' Book" (s. 66), "The Patients' Book" (s. 66.), the Licence or Licences under which the plaintiffs kept the asylum, and the Ledger Book of account, and other documents, containing the accounts between the plaintiff and one J. Conolly, M. D., and the particulars of the fees paid to him.—He cited *Hill v. Philp* (a).

1859.  
STILWELL  
v.  
RUCK.

*Honyman* shewed cause in the first instance, when it appeared that the defendant had brought an action in the Court of Queen's Bench against the plaintiffs for false imprisonment, and that a similar application had been made in that cause to *Hill, J.*, at Chambers. The case was then adjourned in order to ascertain his decision.

*Honyman*, on a subsequent day, stated that *Hill, J.*, had made an order that the inspection be allowed, the costs of the application and inspection to be the defendant's costs in the cause in any event.

*Edwin James*.—The rule laid down in *Gray on Costs* (b) is, that the costs of inspection must be borne by the party seeking it, but the costs of obtaining the order for inspection are costs in the cause. *Hill v. Philp* is referred to as an authority for that position.

MARTIN B.—The Master informs us that there is no such rule. The inspection will be allowed; the costs of the application and inspection to be the plaintiffs' costs in the cause in any event.

Rule accordingly.

(a) 7 Exch. 232.

(b) Page 364.

1859.

April 20.

## THE ATTORNEY GENERAL v. BARRY.

The defendant having reduced to pulp, in a paper mill, the fibrous portion of hides, which he took up, dried and pressed into sheets, by a process similar to that of the manufacture of paper, produced an article resembling parchment, and applicable to ordinary purposes for which paper is employed :—

*Held*, that such article was liable to duty as "paper," by the 2 & 3 Vict. c. 23, ss. 1. 56, and that, not having taken out a licence as a paper maker, the defendant was liable to penalties by 6 Geo. 4, c. 81, s. 26.

**INFORMATION.**—That defendant, on &c., at &c., did make and manufacture certain goods and commodities for the making and manufacturing whereof a licence was and is required by (6 Geo. 4, c. 81, s. 26), to wit certain paper, without taking out or having taken out such licence as is in that behalf required, or any licence whatever, contrary to the form of the statute in that case made and provided: whereby and by force of the statute the defendant hath forfeited 100*l*. Wherefore &c.

Plea: Not guilty.

At the trial, before *Bramwell*, B., at the Middlesex sittings after Michaelmas Term, 1857, in order to prove that the defendant had manufactured paper of a new material, one Forsey, an excise officer, was called. He stated that the defendant was the occupier of some paper mills. In the ordinary mode of making paper, rags of cotton or linen, old ropes, sacking, straw or other materials, after being sorted and cleansed, are sent to the paper engine, where they are torn and reduced to a pulp with water by passing between a cylinder with raised grooves or knives and a plate which forms the bottom of an oblong tub in which the cylinder revolves. The pulp is then carried to a vat or tub, where there is machinery which keeps the water and the pulp continually in motion. If the paper is made by hand, a mould, having a moveable frame, is dipped into the pulp and enough is taken up to form the sheet. The bottom of the mould is a fine sieve, through which the water escapes. The pulp that is left is the sheet of paper. The sheet is then couched or removed from the

mould and placed upon a piece of felt. When a sufficient number of alternate sheets of felt and paper have been piled on each other the whole are placed in a press, where the liquid is forced out. The paper is then removed from the felt and again pressed without any felt. It is then put on lines to dry, and, if necessary, sized. The manufacture of machine-made paper is in principle the same. In the defendant's mills pieces of hide were used in place of rags. The hides were softened with water; the epidermis was removed by hand; the fibrous portion of the skin was cut into small pieces, which, after having been bleached, were put into an ordinary paper engine and reduced to pulp, which was then passed into a vat, kept in motion there, and taken up in an ordinary paper maker's mould. The sheets of pulp were removed from the mould, placed between felt and pressed. When removed from between the sheets of felt the sheets were placed between pieces of calico and again pressed; and, lastly, placed in alternate layers with glazed boards and pressed again. The witness said that, with the exception of placing the sheets between alternate layers of calico, there was no difference in the mode of manufacture at the defendant's mill and that of ordinary paper. The article manufactured by the defendant was available for any purposes to which good stout paper might be applied. Specimens were produced, some of which were fit for binding, some for tracing paper; others closely resembled parchment, and a deed and a writ were produced, the material of which could not easily be distinguished by the eye or touch from parchment, but it was less tough and more easily torn. The witness stated that in his opinion the article manufactured by the defendant was *animal fibre paper*. Saunders, a paper maker, pronounced the specimens to be paper and applicable to the same purposes as ordinary paper. Mr. Cowan, a paper maker, stated that,

1859.

ATTORNEY  
GENERALF.  
BARRY.

1859.  
 ~~~~~  
 ATTORNEY  
 GENERAL  
 v.  
 BARRY.

in 1815, paper of buff leather had been made at his father's mill, of which he produced a specimen. He also produced paper made from animal substances in France in 1849. Mr. De la Rue, a stationer, produced parchment paper, imported from France in 1851, made from animal substances, viz. the intestines of animals.

Assuming the truth of this evidence, the learned Judge directed a verdict to be entered for the Crown, reserving leave to the defendant to move to enter a verdict for him if the question, whether the article manufactured by the defendant was paper, was one of law and which ought to have been decided for the defendant; or to move for a new trial, on the ground that the question ought to have been left to the jury.

Sir *Fitzroy Kelly*, in Hilary Term, 1858, having obtained a rule nisi accordingly,

*Wilde* and *Beavan* shewed cause (a).—The question is, whether the defendant's manufacture is one which is subject to duty as *paper*. It is said, first, that it is not made of vegetable but of animal fibre. Secondly, that its appearance, and the uses to which it is to be applicable, are not those of paper. The argument for the Crown is, that it is paper though made of materials different from those of which paper is usually composed. The 2 & 3 Vict. c. 23, s. 1, allows duties of excise on all "paper," by whatsoever name known. The 66th section enacts that all paper, button-board, mill-board, paste-board and scale-board, of whatever materials made, and by whatever denomination known or called, and however manufactured, &c., shall be deemed and taken to be paper, &c., within the meaning of this Act, and shall be charged with duty accordingly, and the makers thereof shall be, &c., subject and liable to all the

(a) In last Hilary Term, Jan. 28. Before *Pollock*, C. B., *Bramwell*, B., *Watson*, B., and *Channell*, B.

enactments, &c., of this Act, and of the general laws for securing the duties of excise" (a). At the time of the passing of these Acts, paper was made of other things besides vegetable matter reduced to pulp, viz. of silk or asbestos: Encyclopædia Britannica, vol. 17, art. Paper; Encyclopædia Metropolitana, vol. 23, art. Paper. The true test whether the article in question is paper or not, is not its appearance, but the mode of manufacture. By the 6 & 7 Wm. 4, c. 52, s. 17, which enacts that all paper, of whatever materials made, shall be deemed to be paper, within the meaning of that Act, it is provided that until the 11th day of October, 1838, nothing therein contained shall extend to subject to a duty or to any regulations of the excise any goods manufactured under a patent to T. R. Williams for an invention of a new combination of fibrous materials, forming by means of machinery artificial skins. It is clear that the article is not parchment or vellum, on which duty was first imposed by 9 Ann. c. 11, s. 4. The construction of the term "paper" is for the Court, as that of the word "town" was considered to be in *Elliott v. The South Devon Railway Company* (b).


*Bovill and Welsby*, in support of the rule.—The onus of shewing that the article in question is paper lies on the Crown. Possibly it may be parchment, the duty on which was repealed by 11 Geo. 4 & 1 Wm. 4, c. 16, or it may be a new substance, neither parchment nor paper, upon which no duty has been imposed. [*Pollock*, C. B.—Suppose, while the duty on parchment was in force, a skin had been cut up, reduced to small pieces, pulped and put together again, would the party so acting have escaped the duty?] It is submitted that he would have been liable as a tawer :

(a) See further, 10 Ann. c. 19, s. 50; 21 Geo. 3, c. 24, s. 7.

(b) 2 Exch. 725.

1859.

ATTORNEY  
GENERALv.  
BARRY.

1859.  
  
 ATTORNEY  
 GENERAL  
 v.  
 BARRY.


9 Ann. c. 11, s. 28. [*Channell, B.*—If a person made parchment and then cut it up and made it into paper, he may have been liable to both duties.] The material is used as parchment for writs and other purposes for which parchment is used. [*Pollock, C. B.*—It may be parchment for some purposes, and yet paper within the meaning of the Acts imposing duties of excise on paper.] Heat and moisture affect this material as they do parchment. In the statutes the word paper must be taken to have been used in its ordinary and popular sense: *Dwarris on Statutes*, 573. This material had never been treated as paper, nor was it known as paper at the time of the passing of the Act. In *MacCulloch's Commercial Dictionary*, paper is said to be vegetable matters reduced to a sort of pulp (*a*). In *The Mayor of London v. Parkinson* (*b*) it was held that patent fuel, an article composed of coal dust mixed with thirteen per cent. of pitch and lime, was not liable to the duties imposed on "coals" imported into the port of London by the 1 & 2 Wm. 4, c. lxxvi., notwithstanding that it was applicable to similar purposes. [*Pollock, C. B.*—That case seems to shew that this material would not have been chargeable as parchment.] The answer to the question whether the article is paper, mainly depends upon the purposes to which it is to be applied. If the argument on the other side is correct, it would go to shew that the question is one of fact, which should have been left to the jury.

*Wilde*, in reply.—It does not appear that the artificial skins made under Williams's patent, which the legislature treats as chargeable with duty as paper in the 6 & 7 Wm. 4, c. 52, s. 17, were to be used for the same purposes

(*a*) They referred also to Johnson's Dictionary, Rees's Encyclopædia, Webster's Dictionary, and

Richardson's Dictionary.  
 (*b*) 10 C. B. 228.

as paper. The purpose for which the article is to be used does not form the test whether it is paper within the statutes. Nor does the fact that it is made of a new material shew that it is not chargeable with duty. Paper is now made of peat, which was a material not in use when the Act passed, but such paper is undoubtedly liable to duty. This article is classed as paper by persons in the trade ; it is made like paper and used like paper.


1859.  
  
 ATTORNEY  
 GENERAL  
 v.  
 BARRY.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an information by the Attorney General, claiming a duty imposed by the revenue law on paper and other articles of that description. At the trial there was a verdict for the Crown, with liberty to the defendant to move to enter a verdict for him. The facts were not disputed. Sir *Fitzroy Kelly*, on the part of the defendant, accordingly moved and obtained a rule to enter a verdict for the defendant or for a new trial; and the question was, whether the article manufactured by the defendant on which the duty was claimed was paper within the meaning of the 2 & 3 Vict. c. 23, ss. 65 and 66.

The case was argued last Term before this Court, by Mr. *Wilde* on the part of the Crown and Mr. *Bovill* on the part of the defendant, Sir *Fitzroy Kelly* having been appointed Attorney General in the mean time. On the part of the Crown it was contended that the article in dispute came within the description of "paper" in the statute, there being really no difference between paper and the article manufactured by the defendant, except this, that paper is usually made from vegetable fibres, but the article manufactured by the defendant was made from animal fibres, such as skin. The mode of manufacturing it is the same as in the case of ordinary paper, the process is the

1859.  
  
ATTORNEY  
GENERAL  
v.  
BARRY.

same for both. In each case the substance from which the manufacture is produced is made into a pulp, the water is strained off, and the residuum is left in sheets, which are dried and which become tenacious from their fibrous character. On the part of the defendant it was argued that the article was in reality rather parchment, which formerly was subject to a duty, but which is not now subject to it, than paper. The substance in appearance no doubt very much resembles parchment; it is like it to the eye and to the touch, it differs from it in physical qualities chiefly by being less tough and more easily torn: and it was urged that it was not paper, but a new substance, to which the name of paper could be given only because there was no other term at all applicable.

It becomes material to know what is paper as generally understood. The leaves of plants are not paper, though the term no doubt has been taken from papyrus, which people formerly used to write upon as paper now is used. The skins of animals are not paper. Perhaps paper may be described fairly as a manufactured substance composed of fibres adhering together, in form consisting of sheets of various sizes and of different thicknesses, used for writing or printing or other purposes to which flexible sheets are applicable.

Now section 65 says "that the term 'paper' in this Act shall include glazed paper, sheathing paper, button paper, and every kind of paper whatsoever, by whatever denomination known or called." And section 66 says, "all paper, button board," &c. "of whatever materials made, and by whatever denomination known or called, and however manufactured, whether made by the material being reduced to pulp and moulded or finished by machinery, or by being pressed or intermixed in a dry state and made to adhere by pressure or otherwise, shall be deemed and taken to be paper, button board," &c. "within the meaning of this Act."

Now it is clear that the words of that Act, "however manufactured" and "of whatever materials made," are intended to extend the statute to what it might not otherwise have comprehended. Reading the section as though they were not there, the result would be, "all paper, button board, &c., shall be deemed to be paper, button board," &c. Taken literally, that would mean merely that all paper is paper, which gives very little information as to whether this be paper or not. The reasonable meaning is, that whatever is made as paper, button board &c. are made, of whatever materials and by whatever machinery, is paper, button board, &c., within the meaning of the Act; and this construction is very much confirmed by the 6 & 7 Wm. 4, c. 52, s. 17, which expressly exempted from the paper duty, for a time, the manufacture made under the patent therein mentioned.

We think that this case therefore is within the statute, whether the defendant's manufacture is properly called "paper" or not. But we are disposed to think that it is "paper" properly so called. It is manufactured in the same way as paper, which, though generally made of vegetable matter, still in some instances has received an accession of animal matter to increase the bulk, though not entirely formed of it. This article is made altogether of animal fibres, but it is the fibrous quality in each case which makes the sheet tenacious.

Admitting, as Mr. *Bovill* contended, that the popular and primary meaning is to be given to the word "paper," why is not this article included in it? A paper maker would undoubtedly include it—that appeared very distinctly at the trial. Dictionaries include it. Any definition properly comprehensive would also include it. But it is said that an ordinary person looking at it would not call this article "paper." Why? Because he would be deceived

1859.

ATTORNEY  
GENERAL

v.  
BARRY.

1859.  
 ATTORNEY  
 GENERAL  
 v.  
 BARRY.

by its appearance. No doubt it looks much more like parchment; but upon learning in what manner it is made, and of what materials, and the process by which it is produced, it appears to us impossible to refuse to it the appellation of "paper." But, whether it be called "paper" or not, it appears to us to fall within the very large words of the statute, which was intended to comprehend everything that was made by means of pulp, of fibrous matter, and extended into sheets capable of being used as paper.

We think that this is a question entirely upon the construction of the statute as soon as the facts are agreed upon, which they are in this case. We are of opinion that the Crown is entitled to keep the verdict, and we think that the rule to enter the verdict for the defendant, or for a new trial, must be discharged.

Rule discharged.

April 29.

COWARD v. BADDELEY.

A person cannot justify giving another into custody for merely laying hands on him to attract his attention, provided it be not done hostilely.

**DECLARATION.**—That the defendant assaulted and beat the plaintiff, gave him in custody to a policeman, and caused him to be imprisoned in a police station for twenty-four hours, and afterwards to be taken in custody along public streets before metropolitan police magistrates.

Pleas—First: Not guilty. Third: That the plaintiff, within the Metropolitan Police District, assaulted the defendant, and therefore the defendant gave the plaintiff into custody to a police officer, who had view of the assault, in order that he might be taken before magistrates and dealt with according to law, &c.

Whereupon issue was joined.

At the trial, before *Bramwell*, B., at the London Sittings

in last Hilary Term, the plaintiff proved that, on the night of the 31st of October, he was passing through High Street, Islington, and stopped to look at a house which was on fire. The defendant was directing a stream of water from the hose of an engine on the fire. The plaintiff said, "Don't you see you are spreading the flames? Why don't you pump on the next house?" He went away, and then came back and repeated these words several times, but did not touch the defendant. The defendant charged the plaintiff with assaulting him, and gave him into the custody of a policeman who was standing near.

1859.  
  
 COWARD  
 &  
 BAPPELEY.

The defendant swore that, on being interrupted by the plaintiff, he told him to get out of the way and mind his own business: that the plaintiff came up to him again, seized him by the shoulder, violently turned him round, exposed him to danger, and turned the water off the fire.

The learned Judge told the jury that the question was whether an assault and battery had been committed, and he asked them, first, whether the plaintiff laid hands on the defendant; and, secondly, whether he did so hostilely. The jury found that the plaintiff did lay hands on the defendant, intending to attract his attention. Whereupon the learned Judge ordered the verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a verdict for him if the Court should be of opinion that he had wrongly directed the jury in telling them that, to find the issue on the third plea for the defendant, they must find that the plaintiff laid his hands upon him with a hostile intention.

*Shee*, Serjt., in the same Term, having obtained a rule nisi accordingly,

*Beasley* now shewed cause.—The question is, whether the intention of the plaintiff is material to be considered

1859.  
 COWARD  
 v.  
 BADDELEY.

in order to determine whether there was an assault and battery. In *Rawlings v. Till* (a) *Parke*, B., referring to *Wiffin v. Kincard* (b), where it was held that a touch given by a constable's staff does not constitute a battery, pointed out, as the ground of that decision, that there the touch was merely to engage the plaintiff's attention. [*Martin*, B.—Suppose two persons were walking near each other, and one turned round, and in so doing struck the other: surely that would not be a battery. *Pollock*, C. B.—There may be a distinction for civil and criminal purposes. *Channell*, B.—It was necessary to prove an indictable assault and battery in order to sustain the plea.] The maxim “*Actus non facit reum nisi mens sit rea*” applies.—He referred also to *Pursell v. Horn* (c), Archbold's Criminal Law, p. 524 (d), *Scott v. Shepherd* (e).

*Petersdorff*, Serjt., and *Francis*, in support of the rule.—The learned Judge's direction was defective in introducing the word “hostile.” In order to constitute an assault it is enough if the act be done against the will of the party. There are several cases where it has been held that an assault has been committed where there was no intention to do the act complained of in a hostile way, as in the case of a prize fight: *Rex v. Perkins* (f). So a surgeon assisting a female patient to remove a portion of her dress: *Rex v. Rosinski* (g). Here the plaintiff interfered with the defendant in the execution of his duty. In Hawkins's Pleas of the Crown, vol. 1, p. 263, it is said, “Any injury whatever, be it never so small, being actually done to the person of a man in an angry, or revengeful, or rude, or insolent

(a) 3 M. & W. 28.

(b) 2 N. & R. 471.

(c) 8 A. & E. 602.

(d) 12th edition.

(e) 2 W. Black. 892.

(f) 4 C. & P. 537.

(g) Ry. & Moo. C. C. 19.

manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, are batteries in the eye of the law." [*Bramwell*, B.—I think that the jostling spoken of must mean a voluntary jostling.]

1859.  
COWARD  
v.  
BADDELEY.

POLLOCK, C. B.—I am of opinion that the rule must be discharged. The jury found that what the plaintiff did was done with the intent to attract the attention of the defendant, not with violence to justify giving the plaintiff into custody for an assault. The defendant treated it as a criminal act and gave the plaintiff into custody. We are called on to set aside a verdict for the plaintiff, on the ground that he touched the defendant. There is no foundation for the application.

MARTIN, B.—I am of the same opinion. The assault and battery which the defendant was bound to establish means such an assault as would justify the putting in force the criminal law for the purpose of bringing the plaintiff to justice. It is necessary to shew some act which justified the interference of the police officer. Touching a person so as merely to call his attention, whether the subject of a civil action or not, is not the ground of criminal proceeding. It is clear that it is no battery within the definition given by Hawkins.

CHANNELL, B.—I am of the same opinion. Looking at the plea, it is obvious that it was not proved.

BRAMWELL, B., concurred.

Rule discharged.

1859.

May 3.

## CORBETT v. THE GENERAL STEAM NAVIGATION COMPANY.

A Company, carrying on business in London, which employs in a country town a general commission agent, who transacts the Company's business in such town, in an office for which the Company pay him rent, do not "carry on business" in that town within the meaning of the County Court Act, 9 & 10 Vict. c. 95, s. 128.

*FIELD* had obtained a rule calling on the defendants to shew cause why the Master should not tax the plaintiff his costs of this action, notwithstanding the sum recovered was under 20*l.*, pursuant to 15 & 16 Vict. c. 54, s. 4.

It appeared from the affidavits that the defendants were a corporation, and that the action was brought against them, as common carriers, to recover the value of certain goods which had been abstracted from boxes which the plaintiff had delivered to them for carriage by water from London to Newcastle-upon-Tyne. The cause was tried before *Pollock*, C. B., at the Middlesex sittings after last Michaelmas Term, when a verdict was found for the plaintiff for 11*l.* 1*s.* 3*d.*, and no certificate was granted. The plaintiff resided at Newcastle-upon-Tyne, and the defendants carried on their business in the city of London. At Newcastle-upon-Tyne the defendants used a wharf which was rented by Messrs. Parker, who were general commission agents, wharfingers and warehouse keepers, and who acted as the agents of the defendants. The office or counting-house in which Messrs. Parker transacted the business of the defendants was used solely for the defendants' business, and the rent of it was paid by them. Outside the office a board was affixed with the words "London Steam Wharf" painted on it: underneath, in similar letters, "Anthony Parker and Co, general wharfingers."

*Knowles* and *C. Pollock* shewed cause.—The plaintiffs ought to have sued in the County Court of Newcastle. By the 108th section of the 9 & 10 Vict. c. 95, actions may

be brought in the superior Courts where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise within the jurisdiction of the Court "within which the defendant dwells or carries on his business." A corporation "dwells," within the meaning of that enactment, at the place where its business is carried on. By rule 51 (a) service of the summons may be effected on a corporation "by delivering the summons to a secretary, station master or clerk of the defendant at any station or office of the defendant within the district of the Court." [Martin, B.—The Messrs. Parker were not the servants of the defendants; they carried on business on their own account.] There was an office in which the business of the defendants was solely carried on, and the rent of the office was paid by the defendants. [Pollock, C. B.—The Messrs. Parker merely set apart a portion of their premises for the defendants' use, and debited them with a proportion of the rent. *Sheils v. Rait* (b) is an authority, that a man does not "dwell" at a particular place by merely having an agent there. Martin, B.—Some insurance companies have agents in all the principal towns throughout England; and it could never have been intended that they should be sued wherever they had an agent.]

*Field*, who appeared in support of the rule, was not called upon to argue. He referred to *Miner v. The London and North Western Railway Company* (c).

POLLOCK, C. B.—The rule must be absolute. The question is, whether the business was done by the Messrs. Parker for the defendants in the character of servants or of agents. There is evidence to shew that Messrs. Parker

(a) Pollock's County Court Practice, p. 72.

(b) 7 C. B. 116.

(c) 1 C. B., N. S. 325.

1859.  
 ~~~~~  
 CORBETT  
 v.  
 GENERAL  
 STEAM  
 NAVIGATION  
 COMPANY.

were not the servants of the defendants, but their agents only.

MARTIN, B.—I am also of opinion that Messrs. Parker were not the servants of the defendants; there is nothing whatever to show any relation of master and servant between them. If the argument for the defendants were to prevail, the consequence would be that all large companies who have a number of agents throughout the country would be liable to be sued in every district where their agents reside.

CHANNELL, B.—The question is not, whether Messrs. Parker were the defendants' agents, but whether they were their servants; and they clearly were not.

Rule absolute.

May 10.

ROLES v. DAVIS.

A declaration alleged that the defendant, by falsely representing that he was paying 70*l.* a month for stock consumed, and was taking 100*l.* a month as receipts from his business as a publican, induced the plaintiff to purchase the business. At

the trial it appeared that the payments and receipts were as alleged, but the business was chiefly out door business, and that the representation was that it was done over the counter. The Judge amended the declaration by inserting the words, "and that the business was a bar business carried on at home and chiefly over the counter, and not a business done elsewhere or out of the house."—*Held*, that the Judge had power to make the amendment under the 222nd section of the Common Law Procedure Act, 1852.

THE first count of the declaration stated, that the defendant, being possessed of a messuage, shop, and premises, wherein he carried on the business of a publican, was desirous to sell his interest in the same, and in the stock in trade, fixtures, &c. And thereupon the defendant by warranting to the plaintiff that the defendant had paid and was paying 70*l.* per month for the stock used and consumed in the said business, and was taking the sum of 100*l.* per month as receipts from the said business, induced the plaintiff

to buy, and the defendant, by the means aforesaid, then sold to the plaintiff, the defendant's interest in the said messuage, &c., and the good will, stock in trade, &c., for 225*l.* 10*s.*, which the plaintiff paid the defendant. The count then negatived the warranty in terms, and concluded by alleging special damage.—Second count: That the defendant, by falsely and fraudulently representing and stating to the plaintiff that the defendant had paid and was then paying 70*l.* per month for the stock used and consumed in the said business [and that the business was a bar business carried on at home, and chiefly over the counter, and not a business done elsewhere or out of the house], and was then taking the sum of 100*l.* per month as aforesaid, induced the plaintiff to make the contract, purchase, and payment in the first count mentioned, when in truth and in fact the defendant had not, and was not (as he always well knew) paying 70*l.* per month for the stock used in the said business; nor was he then taking the sum of 100*l.* per month. And by means of the premises the plaintiff was and is damnified as in the first count mentioned. And all things necessary to entitle him to maintain this action happened and existed before suit.

Plea to first count: Denial of the warranty.—To second count: Not guilty.

The cause was tried before *Channell*, B., at the London sittings after last Hilary Term, when the plaintiff failed to prove any warranty; and it appeared that the payments and receipts of the defendant in his business as a publican were of the amount alleged in the declaration, but that the business was chiefly done out of the house. The plaintiff stated that the defendant had represented to him that the business was chiefly done over the counter; and, upon the application of the plaintiff's counsel, the learned Judge amended the second count by inserting the words within brackets; and he reserved for the Court the question as to

1859.

ROLES  
v.  
DAVIS.

1859.  
 ROLES  
 v.  
 DAVIS.

his power to make the amendment. A verdict having been found for the plaintiff, with 60*l.* damages,

*Grady*, in the present Term, obtained a rule nisi to enter a nonsuit or for a new trial, on the ground that the learned Judge had no power to make the amendment.

*Parry*, Serjt., and *J. J. Powell*, now shewed cause.—This case is within the letter and the spirit of the 222nd section of the Common Law Procedure Act, 1852 (*a*), which enacts, that “all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties,” shall be made. The question in controversy between the parties was whether the defendant had made a wilful misrepresentation, and thereby induced the plaintiff to purchase the business. The declaration stated the representation too generally, viz., that the defendant was taking 100*l.* a month: he was, in fact, taking that amount; the amendment shewed that the real representation was that the profits were made in a particular manner. The defendant could not have been taken by surprise or prejudiced, for the only effect of the amendment was to shew what the representation was. In *May v. Footner* (*b*), a count in trespass was amended by turning it into a count for injury to the plaintiff’s reversion. In *Edwards v. Hodges* (*c*), where there was a plea of not guilty by statute, an amendment was made by inserting in the margin of the plea the statutes under which the defence arose. In *Mitchell v. Crassweller* (*d*), *Jervis*, C. J., amended by adding a plea. Moreover, it is the province of the Judge to determine what is “the real question in controversy between the parties:” *Wilkin v. Reed* (*e*).

(*a*) See also the 96th section of the Common Law Procedure Act, 1854.

(*b*) 5 E. & B. 505.

(*c*) 15 C. B. 477.

(*d*) 13 C. B. 237.

(*e*) 15 C. B. 192.

*Grady*, in support of the rule.—The learned Judge had no power to make the amendment. The real question in controversy between the parties was whether the defendant paid 70*l.* a month for the stock consumed in the business, and was taking 100*l.* a month as receipts from the business. That is the allegation upon which issue was taken and which the parties went down to try. Having failed on both counts, the plaintiff asks for an amendment which in effect introduces a new count. The true rule for determining what cases are within the Act, is to be found in the judgment of *Jervis*, C. J., and *Maule*, J., in *Wilkin v. Reed* (a), *Maule*, J., there said, that it was intended by the Act “to limit the power of amendment to the introduction of matters which the parties hoped and intended to try in the cause, and not to authorize amendments which might raise questions which never were contemplated before.” This Act does not render it imperative on the Court to allow such an amendment as that : *Ritchie v. Van Gelder* (b).

1859.  
 ROLES  
 v.  
 DAVIS.

POLLOCK, C. B.—This was an application for a nonsuit or a new trial, on the ground that an amendment made by my brother *Channell* ought not to have been made. The declaration consists of two counts; one upon a warranty, and the other upon a false representation corresponding with the warranty. The warranty was not proved, but the evidence raised another question, which my brother *Channell* thought was the real question which the parties came to try, and he amended the second count accordingly. The question is, whether it was competent for him to make that amendment; we think it was, and the rule must be discharged.

Rule discharged.

(a) 15 C. B. 192.

(b) 9 Exch. 762.

1859.

May 12.

WRIGHT and Another v. MILLS.

Judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done. Therefore, where judgment was signed at the opening of the office at its usual hour, eleven A. M., and the defendant died at half-past nine A. M. on the same morning :—  
*Held*, that the judgment was regular.

THE defendant in this case died at half past nine o'clock in the morning of the 28th May, 1858. Judgment in the action was signed at the opening of the office at eleven o'clock on the same day, and execution afterwards issued. On the application of the defendant's administrator, *Williams, J.*, ordered that the judgment and execution be set aside.

*Petersdorff*, Serjt., obtained a rule nisi to rescind the order of *Williams, J.*; against which

*Lush* shewed cause.—The judgment is irregular, it having been signed after the death of the defendant. The law will in many cases notice fractions of a day, and common sense shews that this must be one of them. In some others it refuses to do so; but that is one of those fictions of which the Courts in modern times have endeavoured as far as possible to get rid. [*Martin, B.*—Is not *Edwards v. Reginam* (a), in the Exchequer Chamber, an authority against you?] That case proceeded on the ground that the title of the Crown by extent prevails against an adjudication in bankruptcy on the same day—a view which is confirmed by *Rex v. Earl* (b) and *Rex v. Crump* (c), and is perfectly correct, seeing that the Crown is not bound by the Statutes of Bankruptcy. The language of *Coleridge, J.*, in delivering the judgment of the Court in *Edwards v. Reginam*, no doubt goes further, when he says that, “as a general rule, apart from all questions of prerogative, judi-

(a) 9 Exch. 628.

(b) Bunb. 33.

(c) Referred to in *Parker*, 126.

cial acts are to be taken to date from the earliest minute of the day on which they are done;" but that language is much stronger than any to be found elsewhere, and is at variance with other authorities. In *Thomas v. Desanges* (a), where a sheriff took possession under a fieri facias, and at a later hour on the same day the defendant surrendered in discharge of his bail, and afterwards lay in prison two months, and thereby committed an act of bankruptcy, and by the 21 Jac. 1, c. 19, was a bankrupt from the time of his arrest, it was held that in an action by his assignees to recover the value of the goods the Court would notice the fraction of the day. Also in *Chick v. Smith* (b), where the defendant died between eleven and twelve A. M., and a fieri facias was sued out on the same afternoon, *Patteson, J.*, set aside the writ, on the ground that the good sense of the matter was, that, where it is necessary to shew which was the first of two acts, the Court is at liberty to consider fractions of a day. [*Pollock C. B.*—In the case of *Edwards v. Reginam* reference is made to *Shelley's Case* (c), where a recovery was held good, though the party suffering it died before the sitting of the Court that morning, on the ground that "the record is to be understood of the whole day, and relates, without division, to the first instant of the day," though it is otherwise with acts done by a party. And they add, that that distinction is pointed out in *Lord Porchester's Case* (d), and in *Swaine v. Morland* (e).] *Lord Porchester's Case* only shews that all judgments relate to the first day of the term. [*Watson B.*—In *Tidd's Prac.*, 932, the practice is stated thus:—"At common law the death of a sole plaintiff or defendant before final judgment would have abated the suit; but as the judgment relates

1859.

WRIGHT  
v.  
MILLS.

(a) 2 B. &amp; Ald. 586.

(b) 8 Dowl. 337.

(c) 1 Rep. 93 b.

(d) 3 Dougl. 261.

(e) 1 Br. &amp; B. 370.

1859.  
WRIGHT  
v.  
MILLS.

to the first day of the term, if the party be alive after that day, it may be entered and costs taxed thereon after his death."]. Even supposing the law correctly laid down in *Edwards v. Reginam*, still signing judgment is the act of the party, and not of the Court, except indeed for the purpose of bringing error, or where a delay in signing judgment is occasioned by the act of the Court.

*Malcolm*, in support of the rule.—It might be enough to say that this case is settled by the authority of *Edwards v. Reginam* and the several cases there cited; for *Chick v. Smith* was not much argued or considered. But it is not unreasonable that the Courts should refuse to take notice at what time of the day a judicial act is done. Judicial acts differ widely from the acts of parties, who may act or not as they please, and the Court must, therefore, inquire into the times when they do act, whereas the Court has perfect control over its own acts. Another argument may be deduced from the Practice Rules of Hilary Term, 1853, rule 56, by which it is provided that judgment shall be entered of record of the day when signed, and shall not have relation to any other day. If the framers of that rule meant to abolish the doctrine of relation generally in this matter, and allow inquiry into the hour and minute of signing judgment, they would have done so.

POLLOCK, C. B.—We are all of opinion that this rule must be made absolute. The principal authority on the subject is the case in the Exchequer Chamber of *Edwards v. Reginam*, on a writ of error from the judgment of this Court (reported at p. 32 in the same volume), in which there was a difference of opinion among us. The question there was, whether a fraction of a day could be considered with reference to the time of issuing an extent and an

adjudication in bankruptcy. This Court, consisting of myself, *Parke*, B., and *Platt*, B., my brother *Martin* dissenting, held that it could not; upon the ground that in the Exchequer, if the right of the Crown and that of a subject at all interfere with each other with respect to matters arising on the same day, although the act of the Crown may have been posterior to that of the subject, still it should have priority. That decision, probably in consequence of the dissent of my brother *Martin*, was taken to the Exchequer Chamber, and affirmed by the unanimous decision of that Court. The judgment there was delivered by *Coleridge* J., and proceeded on a different footing, not at all, however, repudiating the doctrine of this Court, that the right of the Crown would prevail in all contests between the Crown and a subject where the question was which was to have priority. But the judgment of the Exchequer Chamber proceeded on a broader and wider principle, viz., that, whether between the Crown and a subject, or between subject and subject, judicial proceedings are to be considered as having taken place at the earliest period of the day on which they are done. It was there expressly stated that the Court will inquire at what time a party does a particular act, for instance, filing a bill or delivering a declaration; and for that purpose will ascertain the hour at which the Courts were sitting &c.; but the Court lays down this rule: "It is otherwise with regard to a judicial proceeding." And *Shelley's Case* (a) is there cited, where a recovery suffered on the first day of term was held good, although the party had died that morning before the Court sat. I consider that case of *Edwards v. Reginam* as an undoubted authority, to which we ought to conform. Now, it appears to me that signing judgment is a judicial proceeding, and consequently to be considered as having taken place at the

1859.

WRIGHT  
v.  
MILLS.


(a) 1 Rep. 93.

1859.  
WRIGHT  
v.  
MILLS.

earliest period of the day when it is done, and therefore not invalidated by what occurred in the present instance. I also think that the Statute of Frauds, 29 Car. 2, c. 3, supplies very good reasons confirmatory of this view. There can be no doubt that by the common law, if the signing of this judgment had taken place out of term, it would have related back to the preceding term, i. e. to the first day of it. This the Legislature considered a hardship, for a man might have sold his estate, and yet a judgment subsequently signed would have bound the lands in the hands of an innocent purchaser for value. To meet this difficulty, the statute renders such judgment valid only from the day of signing, but says nothing about hours or minutes. If, therefore, this judgment would have been good before the Statute of Frauds, it ought to be so now, notwithstanding the death of the defendant on the same day. The case of *Chick v. Smith* (a) was adverted to by the defendant's counsel, in which *Patteson, J.*, ruled that he would take notice of a fraction of a day where a fieri facias was issued after the death of the defendant, and on the same day. Now, there can be no doubt that the issuing a fieri facias is a judicial act, as well as signing a judgment—it is the act of the Court, not of the party;—and my brother *Williams* was probably induced by the authority of that case to make the present order. We consider that case to be more in accordance with the rules of common sense than the rule I have stated relative to judgments being supposed to be signed at the earliest hour of the day when they are signed; but although it is exceedingly desirable that all the decisions of the Courts should, as far as possible, be in accordance with the decisions of common sense, it is impossible to overrule the established practice, which is, indeed, the law of the land

(a) 8 Dowl. 337.

and the right of the suitors. If, therefore, the plaintiff satisfies us that, by this practice of the Court, the signing this judgment, which is a judicial act, is to be considered as having been done at the earliest moment of the day, it is the law of the land and the right of the suitors that we should decide according to the established practice, although founded on a fiction, as it is called. In truth, however, it only amounts to this, that by the practice of the Court you may inquire whether the party was alive on the day, but you shall not inquire into the precise time of his death on that day; and, indeed, one of the grounds on which the practice was established may have been to prevent that sort of inquiry. I therefore think that this rule must be made absolute, on the ground that this judgment was well signed, the party being alive on that day when it was signed.

1859.  
  
 WRIGHT  
 v.  
 MILLS.

MARTIN, B.—The case is concluded by that of *Edwards v. Reginam*, which must be taken as overruling *Chick v. Smith*.

BRAMWELL, B.—I concur in thinking the case concluded by *Edwards v. Reginam*. But that case can only be supported on the principle that judicial acts shall have precedence of others. To give a priority to such acts you must suppose them to have been before the others. It is not that you do not inquire into fractions of a day, but that you give precedence to the judicial proceeding.

WATSON, B.—I am of the same opinion. It might be a very convenient thing if no judgment could be signed after the death of the party whose rights are affected by it, but the law is otherwise. It is clear that this judgment would have been good at common law, for it would have related back

1859.  
 WRIGHT  
 v.  
 MILLS.

to the first day of the term. Its effect is altered in that respect by the Statute of Frauds, 29 Car. 2, c. 3, s. 13, which, after reciting—"Whereas it has been found mischievous that judgments in the King's Courts at Westminster do many times relate to the first day of term whereof they are entered &c., and bind the defendant's lands from that time, although in truth they were acknowledged, or suffered, and signed in the vacation time after the said term, whereof many time purchasers find themselves aggrieved"—enacts, in sect. 14, that the judge or officer signing any judgment shall set down the day of the month and year of his so doing &c.; and, by sect. 15, such judgments, as against purchasers bonâ fide for valuable consideration of lands &c., shall in consideration of law be judgments only from the time they are so entered. Then, by the 4 & 5 Wm. & M. c. 20, s. 3, no judgment not docketed &c. shall have any preference against heirs, executors, or administrators. Taking it, then, that as regards the term all relation is taken away, this is a judicial act which takes place on a given day, no fractions of which are recognised by law. I think, with the rest of the Court, that *Edwards v. Reginam* must prevail here. As to *Chick v. Smith*, the point there was neither so strongly argued nor so fully considered as in *Edwards v. Reginam*. But, even supposing that case an authority on the point, *Edwards v. Reginam* is a later authority the other way; and, in administering the law, we must abide by that later authority. Moreover, if a judgment is wrongly signed, error will lie upon it, though we may not be able to deal with it on motion.

Rule absolute (a).

(a) Reported by W. M. Best, Esq.

1859.

## TAYLOR v. TURNBULL.

May 12.

**T**HE defendant in this case was indebted to the plaintiff in the sum of 346*l.* 16*s.*, being the balance due on a judgment which the plaintiff had obtained against him. The defendant was sole executor and legatee under the will of one Sarah De La Fite, and as such was entitled to and beneficially interested in a sum of 200*l.*, being the arrears of a government annuity granted by the Commissioners for the Reduction of the National Debt on the life of Sarah De La Fite. The defendant, as such executor and legatee, was also entitled to another government annuity, in the name of Sarah De La Fite but granted for the life of the defendant. On the application of the plaintiff, a Judge at Chambers had made orders nisi charging the arrears and the annuity with the judgment debt. Cause was shewn before *Watson*, B., who made an order discharging these orders.

A judgment debtor was entitled, as sole executor and legatee under the will of D., to the arrears of a government annuity granted for the life of D. He was also entitled as such executor and legatee to a government annuity in the name of D., but granted for his own life:—*Held*, that neither the arrears nor the annuity were chargeable under the 1 & 2 Vict. c. 110, s. 14.

*Raymond* now moved to rescind the order of *Watson*, B.—The 1 & 2 Vict. c. 110, s. 14, enacts, “if any person against whom any judgment shall have been entered up, &c., shall have any government stock, funds, or annuities, &c., standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge, &c., on the application of any judgment creditor, to order that such stock, funds, annuities, &c., shall stand charged with the payment of the amount for which judgment shall have been so recovered,” &c. The 3 & 4 Vict. c. 82, s. 1, extended the provisions of that Act to the interest of any judgment debtor whether in possession, remainder, or reversion, and whether vested or contingent, as well in any stocks,

1859.

TAYLOR  
v.  
TURNBULL.

funds, annuities or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities or shares. As the defendant is beneficially interested as sole executor and legatee, the annuities are liable to be charged under these Acts. [*Martin, B.*—The effect would be to enable the creditor to take the property of the deceased to pay the executor's debt. *Bramwell, B.*—These are not the arrears of an annuity “standing in the defendant's name in his own right or in the name of any person in trust for him.”] The second annuity is different in its circumstances from the first: it is in the name of the deceased, but granted for the life of the defendant.

Per CURLIAM (a).—Neither the arrears of the first annuity nor the other annuity are within the words of the 1 & 2 Vict. c. 110, s. 14, and therefore there will be no rule.

Rule refused.

(a) *Pollock, C. B., Martin, B., Bramwell, B., and Watson, B.*

April 20.

EMMA GRINHAM v. WILLEY.

A felony having been committed, the defendant sent for a policeman, who, on the defendant's information, and on inquiries made by himself, arrested the plaintiff. The defendant accompanied the policeman to the station and signed the charge sheet.—*Held*, that the defendant was not liable in an action of trespass.

DECLARATION.—That the defendant gave the plaintiff into the custody of a policeman and caused her to be imprisoned in a police station, and to be conveyed thence in custody to a police court and to be there further imprisoned.

Second count.—For a malicious prosecution.

Pleas.—First: Not guilty. Second: A justification.—

Whereupon issues were joined.

—*Held*, that the defendant was not liable in an action of trespass.

At the trial, before *Bramwell*, B., at the London sittings after Hilary Term, the plaintiff proved that she was barmaid to one Massey at the Crown Public House. The defendant who had been robbed of a watch, and had agreed to give 10*l.* to one Jacobs to procure its restoration, was at the Crown Public House, where he gave 7*l.* 10*s.* on this account to Jacobs. The robbery was talked of in the house. The plaintiff said she saw the defendant and Jacobs together, but did not hear anything said about getting back the watch. Jacobs went out and shortly afterwards a man came in and handed to the plaintiff a sealed parcel, and told her to give it to the defendant, which she did. The watch was in the parcel. Shortly after, a policeman, who was in attendance by desire of the defendant, came into the room and inquired of the defendant who had given him back the watch. He said he received it from the plaintiff. The policeman then took the plaintiff and Jacobs to the police station, where the defendant, as the plaintiff said, "gave them in charge." A witness stated that when the policeman came, the defendant said, "This is the man I gave the money to; and this," pointing to the plaintiff, "is the person who gave the watch to me." The policeman said to the plaintiff, you must come with me.

The defendant called the policeman, who stated that, in consequence of information he had received, and the questions he put to the plaintiff, he took her into custody. The defendant went with the policeman, Jacobs and the plaintiff to the police station, where the inspector took the charge and entered it on the charge sheet, and the defendant signed the charge sheet. The plaintiff was committed for trial, but the grand jury ignored the bill. Upon this evidence, the learned Judge told the jury that he thought there was no evidence that the defendant had given the plaintiff into custody: that charging a person with an

1859.  
GRINHAM  
v.  
WILLEY.

1859.  
  
 GRINHAM  
 v.  
 WILLEY.

offence was a different thing from giving such person into custody : that the defendant neither ordered nor authorized the constable to take the plaintiff into custody, and advised the jury to find that the defendant did not authorize the constable to take her into custody. The jury found that the defendant did not give the plaintiff into custody, but that the plaintiff was given into custody by the consent of the defendant. The learned Judge directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter a verdict for 10*l.*, the damage found by the jury.

*Henry James* now moved accordingly.—The defendant sent for the policeman and authorized the arrest. That is sufficient to make him liable in trespass. By signing the charge sheet he ratified the act of the constable in arresting the plaintiff. If a constable in effect says, “Do you wish this person to be kept in custody?” and the answer is, in words or by actions, “Take that person into custody or keep him in custody,” the person so answering is chargeable in trespass. That is in accordance with *Flewster v. Royle* (a), cited in *Gosden v. Elphick* (b).

POLLOCK, C. B.—There will be no rule. The circumstances of this case are, that the defendant appealed to the authorities who are charged with the preservation of the peace. The arrest and detention were the acts of the police officer, and the defendant did nothing more than he was bound to do, viz. sign the charge sheet. He may have been liable if he acted *malâ fide*, but not otherwise. I agree with the observations of Lord *Cranworth* and *Alderson*, B., as to the case of *Flewster v. Royle* (c). We ought

(a) 1 Camp. 187.

(b) 4 Exch. 445.

(c) See *Gosden v. Elphick*, 4 Exch. 447.

to take care that people are not put in peril for making complaint when a crime has been committed. If a charge be made *malâ fide*, there are ample means of redress. But in the absence of *mala fides* we ought not to be too critical in our examination of the facts, to see if something is not done without which the charge against the suspected person could not have been proceeded with. A person ought not to be held responsible in trespass, unless he directly and immediately causes the imprisonment.

1859.  
GRINHAM  
v.  
WILLEY.

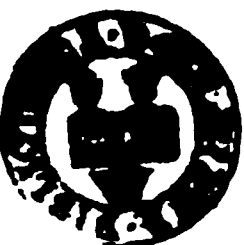
MARTIN, B.—I also think that there should be no rule, upon the ground that the policeman must be taken to have given a true account of the matter. If so, the mere writing of the defendant's name on the charge sheet does not make the defendant a trespasser.

CHANNELL, B.—The verdict proceeded upon the ground that the policeman gave the true account of the matter. Were it otherwise I should have felt some doubt.

BRAMWELL, B.—I retain the same opinion I expressed at the trial. The plaintiff said, "the defendant gave me in charge." She ought to have been asked what took place. The policeman, however, stated what did take place. I do not believe that the plaintiff meant to state what she believed to be untrue; she used what she considered an equivalent expression. An offence was committed; the defendant sent for a policeman, who made inquiry, and on his own authority arrested the plaintiff. The defendant signed the charge sheet; but in doing so he did nothing but obey the direction of the police. It may have been hard upon the plaintiff that she was imprisoned, but it was the act of the constable.

Rule refused.

1859.



May 2.

## MARSDEN v. MOORE and DAY.

To a declaration on an agreement, setting out that "the plaintiff had agreed to sell, and that the defendants had agreed to purchase of the plaintiff one fourth share in a mining sett for 250*l.*; and that the plaintiff and the defendant agreed forthwith to form a company, to be registered with limited liability, for working the mining sett; and that, so soon as the company should be registered with limited liability, the defendants would pay to the plaintiff the sum of 250*l.*, as thereinbefore stated;" assigning as a breach non-payment of the 250*l.*; the defendants pleaded; first, that the plaintiff had not at the time of making the agreement, nor hath he now, any title to the said one fourth part or share in the said mining sett, nor any right or title to convey the same. Secondly, that the plaintiff never has been at any time ready and willing to convey the said one fourth share to the defendant according to the agreement.—*Held*, that the pleas were good.

**DECLARATION.**—That the plaintiff agreed with the defendants to sell to them one fourth part or share in a mining sett situate and known by the name of Osom's Hill for the sum of 250*l.*; and the defendants agreed with the plaintiff to purchase of him the said one fourth part or share in the said mining sett at the price aforesaid; and it was further agreed that the plaintiff and defendants should form a company, with a capital of 20,000*l.*, for working the mining sett &c.; and as soon as the company should be registered, with limited liability, the defendants would pay to the plaintiff 250*l.*—Averment: that all conditions precedent, matters and things requiring to have been performed and to have happened and existed to entitle the plaintiff to the performance of the defendants' said agreement, and to maintain this action for the non-performance thereof, were performed and did happen and exist before the commencement of this suit: yet the defendants did not pay the said sum of 250*l.* or any part thereof.

Second plea, by defendant Day.—That the agreement was an agreement in writing signed by the defendants, as follows:—"Memorandum of agreement entered into between W. Marsden of the first part, and Paul Moore and Edward Day of the second part. W. Marsden has agreed to sell to Paul Moore and Edward Day one fourth part or share in a mining sett situate and known by

the name of Osom's Hill in the parish of Grindon, in Staffordshire, for the sum of 250*l.*, and Paul Moore and Edward Day agree to purchase at that price: and it is further agreed between the parties that they will forthwith form a company, under the Limited Liability Act, with a capital of 20,000*l.*, for working or developing the said mining sett, with such rules and regulations as the promoters shall afterwards agree and determine; and as soon as the company is registered, with limited liability, we, P. Moore and E. Day, will pay to W. Marsden the sum of 250*l.* as hereinbefore stated."—Averment: that the plaintiff had not at the time of making the agreement, nor had he at any time afterwards, nor hath he now, any title to the said one fourth part or share in the said mining sett in the declaration mentioned, nor any right or title to convey the same.


Third plea.—That the agreement in the declaration mentioned was that set forth in the second plea; and that, according to the agreement, the plaintiff ought, before being entitled to call on the defendants for payment of the sum of 250*l.* or any part thereof, to have been ready and willing to convey the said one fourth part or share in the mining sett. But the plaintiff never has been at any time ready and willing to convey the same to the defendants according to the said agreement.

Similar pleas were pleaded by the defendant Moore.

Demurrers and joinders.

*Karslake*, in support of the demurrers.—The agreement expressly stipulates that the defendants shall pay the 250*l.* at a certain time, viz. as soon as the Company is registered. [*Bramwell*, B.—If a man agrees to buy an estate and pay for it on a certain day, that implies that the seller is to convey the estate at the same time to the purchaser.] Assuming that the plaintiff has no title, still he may be in

1859.  
  
 MARSDEN  
 v.  
 MOORE.

1859.  
  
**MARSDEN**  
 v.  
**MOORE.**

actual possession. The plaintiff has gone to the expense of registering the Company. The want of title therefore does not go to the whole consideration. The defendants would have a right of action against the plaintiff on the implied agreement to give a good title. The plaintiff may have had an agreement with the owners of the land enforceable by a Court of equity. In *Pordage v. Cole* (a) it was held that, if it be agreed between A. and B. that B. shall pay a sum of money for his land &c. on a particular day, these words amount to a covenant by A. to convey the land; but it is an independent covenant, and A. may bring an action for the money before any conveyance by him of the land.

*Gray*, for defendant Day.—It is true that if a man agrees to sell an estate for 10,000*L.*, to be paid on the 10th of May, an action may be brought on the 10th of May, though the plaintiff is not then in a condition to convey, if he is ready to convey in a reasonable time : *De Medina v. Norman* (b). But upon this agreement there is nothing to shew that the party purchasing the mining sett did not intend to have the property conveyed to him on payment of the purchase money; therefore this case is not governed by *Pordage v. Cole* (a) and *Dicker v. Jackson* (c). [*Martin*, B.—Would not the pleas be proved if the plaintiff had an equitable interest and there was a trustee ready to convey? *Bramwell*, B.—Or suppose he had an equity of redemption.] The effect of the pleas is that the plaintiff has not any title or any means of giving one. A traverse of the readiness and willingness to convey puts in issue the plaintiff's ability to do so : *De Medina v. Norman* (d). As to the first plea, the plaintiff must answer the allegation in the plea; and if he has not a title he must shew that some one else has. [*Bramwell*, B.


(a) 1 Saund. 319.

(b) 9 M. & W. 820.

(c) 6 C. B. 103.

(d) 9 M. & W. 820. 828.

—Surely that is not so. The plaintiff does not bargain for his own title, but that he will give a title to the defendant.] In *Manby v. Cremonini* (a) a day was named for the payment of money, as in the present case, and the question was whether there was an absolute contract to pay the residue of the purchase money on such day. But the Court thought that the defendant was not bound to pay the money upon that day unless the plaintiff had made out a good title and was ready to execute a conveyance.

1859.  
  
 MARSDEN  
 v.  
 MOORE.

*Field*, for defendant Moore, referred to *Purvis v. Rayer* (b), and *Bramwell, B.*, to *Webb v. Austin* (c).

*Karslake*, in reply.—The authority of the case of *Pordage v. Cole* is admitted. Now if, instead of the words “as soon as the Company is formed, with limited liability,” the words had been “on the 21st of June,” that case would have been a direct authority. The words as to the time of payment are the words of the defendants. The time and the event upon which the money is to be paid, viz. the registration of the Company, were fixed by the defendants. The pleas only allege that *plaintiff* had no title, and that *he* was not willing to convey.

POLLOCK, C. B.—We are all of opinion that the pleas are good and that the defendants are entitled to judgment. The question is, what did the parties mean by the agreement declared on, whether each party is entitled to insist on performance by the other, without reference to his capacity to perform his own part of the agreement. The plea sets out an agreement by which, “as soon as the Company is registered, with limited liability,” the defendants

(a) 6 Exch. 808.

(b) 9 Price, 488. 518.

(c) 7 Man. & G. 701.

1859.  
MARSDEN  
v.  
MOORE.

agree to pay to the plaintiff the sum of 250*l.* "as thereinbefore stated;" that is, as the purchase of a mining sett. I do not think that the reference to the uncertain period depending upon the registration of the Company brings the case within the rule laid down in *Pordage v. Cole* (a). It is essential to a contract of buying and selling that one shall pay, the other sell or convey. On that ground this case is distinguishable from *Pordage v. Cole* (a). In such cases each party intends that the other shall perform his part, and not to rely on a right of action. Therefore, in the present case, the plaintiff is not in a condition to maintain the action.

MARTIN, B.—I am of the same opinion. I think that the law is correctly laid down in *Pordage v. Cole* (a). In order to see the meaning of this contract the parts of it should be separately considered. First, the plaintiff agrees to sell to the defendant a share in a mining sett for 250*l.*, and the defendants agree to purchase at that price. The sale and payment of the money are to be contemporaneous acts. In the notes to *Pordage v. Cole*, 1 Wms. Saund. 320 *e*, it is said, rule 4, "Where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred;" and rule 5, "Where two acts are to be done at the same time, neither party can maintain an action without shewing performance of, or an offer to perform his part." This particularly applies to the case of sales, where the common understanding is that one thing is to be exchanged for another. Then as to the other part, as soon as the Company is registered the defendants agree to pay the sum of 250*l.*, "as hereinbefore stated." That does not convey to my mind that the defendants meant, if it should turn out that the plaintiff had no title, to take


(a) 1 Saund. 319.

their chance of being able to recover back the 250*l.* in an action for money had and received.

1859.  
MARSDEN  
v.  
MOORE.

BRAMWELL, B.—I am of the same opinion. In the case of *Pordage v. Cole*, the Court construed the agreement as if it appeared on the face of it that there was no intention that the conveyance should take place on the day appointed for payment of the money. Assuming that to be so, the case is rightly decided; but whether I should have so construed the agreement is another matter. Here the plaintiff agrees to sell, the defendants agree to purchase; there is a clear present agreement for a future sale and payment. The subsequent part of the agreement merely postpones the time for performance; it does not alter the effect of the prior stipulation, which is, that the money is to be paid upon the conveyance. The sale and payment are to be contemporaneous. The last plea is clearly good. As to the other plea there is more difficulty. The question is, whether the defendant has sufficiently negatived the existence of such a title as would have enabled the plaintiff to convey the sett to the defendants. In the old days I think we should have said it was good in substance as an averment that there was no title.

CHANNELL, B.—I entirely agree with the correctness of the propositions of law laid down in *Pordage v. Cole*. Whether they govern the present case depends upon the construction of the agreement. By the first part of the agreement the payment and conveyance are to be concurrent acts. The plaintiff is to sell, and the defendant is to buy, a mining sett, at a price specified. Then is that altered by the subsequent part of the agreement? I think not. The true construction of the whole is, that the conveyance and payment are to be concurrent acts; but a provision is

1859.  
  
 MARSDEN  
 v.  
 MOORE.

made as to the time at which the concurrent acts are to be done. The pleas are good traverses of that which is alleged in the declaration.

Judgment for the defendants.

May 11.

BETTS v. BURCH.

By an agreement in writing, the plaintiff agreed to "sell and the defendant to purchase the household furniture, stock in trade, &c., by valuation; B. to value for plaintiff and M. for defendant; the goods to be valued, and possession given on or before the 13th of October, 1858; and in the event of either of the parties not complying in every particular set forth in this agreement, he should forfeit and pay the sum of 50*l.*, and all expenses attending the same." The defendant did not take possession of the goods, which the plaintiff subsequently sold

**DECLARATION.**—That, on the 28th of April, 1858, by an agreement in writing, the plaintiff agreed to sell, and the defendant to purchase, the household furniture, fixtures, stock in trade and effects in and upon the premises, at the King's Head, Wye, by valuation in the usual way, viz., J. Bayley to value for the plaintiff and T. Marsh for the defendant; the goods to be valued and possession given on or before the 13th of October, 1858; and, in the event of the plaintiff or defendant not complying with every particular set forth in the said agreement, the defaulter should forfeit and pay to the other the sum of 50*l.* and all expences attending the same; and, although the said household furniture, fixtures, stock in trade and effects were duly valued pursuant to the said agreement, and the plaintiff duly performed all conditions precedent on his part, and was ready and willing to give up possession of the said household furniture, &c., pursuant to the said agreement, of which the defendant had due notice, yet the defendant broke his agreement and did not take possession of the said household furniture, &c., or pay the amount of the valuation, but wholly neglected and refused so to do, or in any way to carry out his agreement, or to pay the sum of 50*l.* forfeited to the plaintiff by

to another person. In an action for the breach of the agreement, the defendant paid into Court 5*l.* The jury having found a verdict for the defendant: on motion to enter a verdict for the plaintiff for 45*l.*:—*Held*, that the sum of 50*l.* was a penalty and not liquidated damages; and therefore that the defendant was entitled to retain the verdict.

such default; and the plaintiff, by reason of the said breach of the said agreement, hath lost the profit and benefit which he would have derived therefrom, and hath been put to great trouble and expence in hiring another house, &c.

Plea.—Payment into Court of 5*l*.

Replication.—That the said sum is not sufficient to satisfy the plaintiff's claim. Issue thereon.

At the trial, before *Wightman*, J., at the Spring Assizes at Maidstone, an agreement was proved by which the plaintiff agreed “to sell, and defendant to purchase, the household furniture, fixtures, stock in trade and effects in or upon the premises, at the King's Head, Wye, by valuation in the usual way, viz. M. J. Bailey to value for the plaintiff and T. Marsh to value for the defendant; the goods to be valued and possession given on or before the 13th of October, 1858, and, in the event of either of the above named parties not complying to every particular set forth in this agreement, he shall forfeit and pay the sum of 50*l*. and all expences attending the same.” The defendant did not come and take possession on the 13th of October, and the plaintiff, some months afterwards, sold the goods, &c., to one Hunt. The jury found a verdict for the defendant; the learned Judge reserving leave to the plaintiff to move to enter a verdict for 45*l*.

*Deedes* having obtained a rule nisi accordingly, or for judgment non obstante veredicto for 45*l*., on the ground that the sum of 50*l*. was liquidated damages, and that the plea confessed the plaintiff's right and gave no answer to it,

*Bovill* and *Holl* now shewed cause.—Where the sum which is to be the security for the performance of an agreement to do several acts will, in case of breaches of the agreement, be in some instances too large, and in others too small a compensation for the injury thereby occasioned,

1859.

BETTS  
v.  
BURCH.

the common understanding is, that the entire sum is not to be actually paid: *Horner v. Flintoff* (a), *Kemble v. Farren* (b), *Boys v. Ansell* (c), and *Beckham v. Drake* (d). Now by the agreement, in the present case, possession is to be given on the 13th of October. Suppose the plaintiff in the mean time had drunk a bottle of the wine; or suppose he had given up possession on the 14th instead of the 13th, it would hardly be contended that the whole penalty would be payable. There are cases in which, the damages being indefinite and the parties having themselves fixed the amount which ought to be paid in the event of a breach, the sum has been treated as liquidated damages; as in *Reynolds v. Bridge* (e) and *Athyns v. Kinnier* (f). But this is not such a case, because the damages arising from the breaches of the stipulations may be small and are in their nature easily ascertainable: *Dimeck v. Corlett* (g). *Reilly v. Jones* (h) is overruled by *Davies v. Penton* (i).

*Petersdorff*, Serjt., and *Deedes*, in support of the rule.—The intention of the parties appears to have been that, in the event of the entire nonperformance of the agreement, the sum of 50*l.* should become payable absolutely as a liquidated sum, in addition to any expenses occasioned by the nonperformance. On that ground this case is distinguishable from those referred to on the other side. The plaintiff here alleges a total refusal to carry out the agreement in any way. [*Pollock*, C. B.—It is consistent with what appears on the record that the defendant did not take possession on the day named, but that he did so, and paid the money, a week after.] Though the contract comprised several things it is simply an agreement to do one thing,

(a) 9 M. &amp; W. 678.

(b) 6 Bing. 141.

(c) 5 Bing. N. C. 390.

(d) 8 M. &amp; W. 846.

(e) 6 E. &amp; B. 528.

(f) 4 Exch. 776.

(g) Privy Council, July 14th, 1858.

(h) 1 Bing. 302.

(i) 6 B. &amp; C. 216.

viz. to purchase the furniture and stock in trade. In this respect the case resembles *Sainter v. Ferguson* (a). It is distinguishable from *Kemble v. Farren* (b) and *Davies v. Penton* (c), because in those cases the penal sum was to become payable on the happening of either of several events, in respect of some of which the penalty would be much too large and of others too small. Here the agreement is that the 50*l.* is to become payable on nonperformance, i. e. entire nonperformance of the agreement. *Reilly v. Jones* (d) closely resembles the present case and must govern it. *Galsworthy v. Strutt* (e) affirms the principle on which that case was decided. The Court cannot see that there was no intention that the whole sum should be paid absolutely on the happening of the events on which by this agreement it is made payable.

1859.

BETTS  
r.  
BURCH.

MARTIN, B.—I am authorized to state that the Lord Chief Baron and my brother *Watson* agree in thinking that the rule must be discharged. For my own part, if the agreement were put before me and I were not embarrassed by the cases, I should be prepared to hold that parties are at liberty to enter into any bargain they please, and that we have nothing to do except to ascertain their meaning and carry it out; and if they have made an improvident bargain they must take the consequences. But I feel myself bound by the cases, and not at liberty to act on that view. The plaintiff's counsel have established that the same construction must be put on the agreement for both parties. Now, as that is so, it would follow, if the construction contended for on the part of the plaintiff were to prevail, that if a very small part of the price were unpaid the defaulter

(a) 7 C. B. 716.

(b) 6 Bing. 141.

(c) 6 B. &amp; C. 216.

(d) 1 Bing. 302. See also  
*Crisdee v. Bolton*, 3 C. & P. 240.

(e) 1 Exch. 659.

1859.

**BETTS**  
v.  
**BURCH.**

would be liable to the penalty of 50*l*. The cases are too strong, and I am bound to say that this is a penalty.

BRAMWELL, B.—I agree that the rule must be discharged. I think that the question depends upon whether the agreement is within the 8 & 9 Wm. 3, c. 11, s. 8. At common law the plaintiff would be entitled to 50*l*., and the only thing which has affected his right is the 8 & 9 Wm. 3, c. 11, s. 8. There is plenty of authority for the proposition that it would not be improper to assign breaches. In *Beckham v. Drake* (a), which was an action on an agreement providing that the party making default should pay to the other the sum of 500*l*. by way of specific damages, *Williams, J.*, observed that “if the statute had never passed the plaintiff would have been entitled, on proof of the breach of the agreement alleged in the declaration, to recover the whole 500*l*., even though it be a penalty and not liquidated damages; and that, notwithstanding the statute, if the action had been brought in debt, the plaintiff would still be entitled to have judgment entered for the whole 500*l*., although he could only take out execution for such damages as the jury should assess on the breach assigned” (b). Lord *Wensleydale* expressed a similar opinion (c). Originally a plaintiff recovered the debt at law. Courts of equity thought that they could do substantial justice by setting aside the agreement and awarding damages. That induced the legislature to interfere, and by the statute to provide that no more than the actual damages should be recoverable at law. The statute relates to actions “upon any bond or on any penal sum for non-performance of any covenant or agreement contained in any indenture, deed or writing.” In 1 Wms. Saund. 58, note 1, it is said: this statute “extends as well to bonds

(a) 2 H. L. 579.

(b) Page 598.

(c) Page 628.

with conditions thereunder written for the performance of any thing contained therein, and to penalties on articles of agreement and the like for the non-performance of covenants or agreements contained in the same articles." The question is, whether this is an action on a penal sum for the non-performance of agreements contained in any writing. Is it for the performance of agreements? Different damages would be recoverable by the vendor under different circumstances. One breach might be the non-payment of the purchase money, in which case the damages might be the amount of the purchase money. Another the non-delivery of a very small portion of the goods, for which the damages might be very small. The sum is penal in its character, and in addition the word "forfeit" is used. I believe the true ground on which this case must be decided is that it is within the statute. As to the authorities, it is remarkable that from the first to the last the statute is not mentioned. It seems as if, by some singular instinct, the Courts have been right, though without referring to the statute by which they ought to have been governed. I believe that the reason is that the Judges have considered when equity would have relieved. I agree with most of the cases. The words "liquidated damages" or "penalty" are not conclusive as to the character of the sum stipulated to be paid, for if the whole agreement is such that the Court can see that the sum is a penal sum, it must be so treated. On the other hand, if it is not a penal sum, it would be incorrect to treat it as a penalty merely because it is so called in the agreement. In *Galsworthy v. Strutt* (a) Lord *Wensleydale* treated the covenant as an agreement not to do *one* thing, with an option to do it if the defendant paid 1000*l*.

1859.

BETTS  
v.  
BURCH.

Rule discharged.

(a) 1 Exch. 659.

1859.

April 30.

PRICE v. WORWOOD.

In ejectment, against a tenant for forfeiture by non-insurance, brought on the 24th of December, 1858, it was proved that on two occasions, the first a year and a half before action brought, and the second in August 1858, the defendant had admitted that he was uninsured. On the latter occasion he stated that he wanted the money for other purposes.

Notice was given to the defendant to produce the policy at the trial, which he failed to do. On the 23rd of December, 1858, the plaintiff received some rent from the undertenants of the premises, "on account of rent due at Michaelmas."


—*Held*: First, that there was

evidence from which a jury might presume a continuing breach of the covenant to insure on the 24th of December at the time of action brought.

Per *Pollock*, C. B., and *Martin*, B., the receipt of rent is not a waiver of a forfeiture, unless it be of rent due on a day after the forfeiture was incurred; and therefore the acceptance of rent from the undertenants had not the effect of a distress, so as to operate as a recognition of the existence of the defendant's tenancy on the 23rd of December when the money was received.

**EJECTMENT.**—The writ was dated the 24th of December, 1858. At the trial, before *Channell*, B., at the sittings in Middlesex after Hilary Term, it appeared that the action was brought to recover possession of three houses in Hyde Place, Hoxton, held by the defendant under a lease dated in August, 1852, at the rent of 3*l.* 10*s.* a year. The lease, which was in the short form given by the 8 & 9 Vict. c. 124, Schedules 1, 2, contained covenants by the lessee to pay rent and insure in the joint names of the lessor and lessee, and produce receipts for the premiums, with a proviso for re-entry on non-payment of the rent or non-performance of the covenants. Rent being in arrear, the plaintiff, in October, 1858, applied for payment. The defendant said he could not pay. The plaintiff then attempted to distrain, but could not get into the premises. After sunset on the 4th of November he entered the ground floor, where he saw only a few fixtures and some furniture of small value, not sufficient to cover the rent. The plaintiff stated that, a year and a half before the action, he had spoken to the defendant about the insurance. The defendant said he had not insured, and promised to do so. The plaintiff said, "Get it done, and shew me the policy." The plaintiff mentioned the Alliance Fire Office. About a year afterwards the plaintiff again spoke to the defendant on the subject, when the defendant admitted that the pre-

mises were uninsured, and stated that he wanted the money for other purposes. On the 23rd of December, 1858, the plaintiff received 3*l.* 10*s.* from two of the undertenants of the premises, and gave receipts "in part payment of rent due to me at Michaelmas, 1858." The plaintiff had inquired at the Alliance Office and had given notice to the defendant to produce the policy at the trial. The policy was called for but not produced.

1859.  
  
 PRICE  
*v.*  
 WOBWOOD.

Upon these facts, the defendant's counsel submitted that there was no evidence to go to the jury; but the learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict if the Court should be of opinion that there was no evidence to be submitted to the jury.

*Hawkins*, in Easter Term, having obtained a rule nisi to set aside the verdict and to enter a nonsuit or verdict for the defendant, on the ground that there was no evidence for the jury to support the plaintiff's case,

*Pigott*, Serjt., and *Pearce* shewed cause (April 29).—The defendant had stated, six months before the writ was served, that he could not afford to insure, and had made a similar excuse twelve months previously to that. Now, assuming that the plaintiff must prove the negative proposition, that the defendant was not insured after the acceptance of the rent on the 23rd of December, it is enough if some evidence was given; and for that purpose the presumption of the continuance of the state of facts existing in August is sufficient. Next, the acceptance of rent from the undertenant is no waiver of the forfeiture. [*Martin*, B.—In *Croft v. Lumley* (a), in the House of Lords, Lord *Wensleydale* seemed to think that the true question was

(a) 6 H. L. 672.


1859.  
 PRICE  
 v.  
 WORWOOD.

whether the money was received with the intention of waiving the forfeiture. The acceptance must be of rent due after the breach, in order to amount to a waiver. *Brammoell*, B.—The plaintiff could only have entitled himself to receive the rent from the undertenants because he could have distrained. Taking the rent admits that he could have distrained for rent due in September. But since the 8 Ann. c. 14, s. 6, the tenancy need not have continued to have enabled the plaintiff to distrain in December, when the rent was received.]

*Hawkins* and *Doyle*, in support of the rule.—The receipt of the rent by the plaintiff on the 23rd of December, 1858, was a waiver of the forfeiture. *Patteson*, J., in a similar case, *Doe d. Bridger v. Whitehead* (a), said that the inference from the acceptance of rent was that the plaintiff was satisfied of the premises having been insured since a period when the defendant had refused to produce his receipt or give any information respecting the policy. [*Pollock*, C. B.—Is not the acceptance of rent by a landlord some evidence against him that the tenant's lease is a subsisting lease? Now suppose the mere payment of rent on the 23rd of December by the defendant would not have been sufficient, may not the taking rent from undertenants, who were under no contract to pay to the plaintiff, have been equivalent to a distress in affirming the tenancy?] It would have that effect. No presumption can be made as to the continuance of the non-insurance. [*Pollock*, C. B.—The law will presume a state of things to continue which is lawful in every respect; but if the continuance is unlawful it cannot be presumed. If a man stated that he had not taken an oath on the 1st of January, that would afford no presumption that he had not

(a) 8 A. & E. 571. 574.

done so on the 20th if his acting in a particular capacity on that day without having taken an oath would be illegal.]

1859.  
  
 PRICE  
 9.  
 WOODWARD.

*Cur. adv. vult.*

The following judgments were now pronounced.

POLLOCK, C. B. — We are of opinion that there was evidence to go to the jury that the premises were uninsured. My brother *Channell*, who tried the cause, doubted whether there was evidence, but reserved the point for Mr. *Hawkins*, saying, he should like to take the opinion of the jury, and asked him if he would address the jury. Mr. *Hawkins* declined, and preferred making an application to the Court on leave reserved. The jury found for the plaintiff in the ejectment, on the ground that they were satisfied that the premises had not been insured, and, looking at the nature of the evidence, in effect it was this: that twice over the tenant had declared that he had not insured the premises on account of his inability to do so; again, he had been told to insure, and to shew the document when he obtained it to the landlord, which he had failed to do, and therefore, at the time these declarations were made, there was distinct evidence that there had been no insurance. There was no evidence or anything to lead to the inference that there had been an insurance afterwards, except this, that the rent had, in some measure, been paid. But, looking at the opinion of Lord *Coke* (Co. Litt. 211 b.), as to the effect of the mere payment of this rent, it is not to be considered equivalent to a distress. An actual distress is so clear an affirmance of the tenancy existing at the time that it does away with all previous forfeitures. It is an acknowledgment of such a character that the landlord can-

1859.  
PRICE  
R.  
WORWOOD.

not afterwards say "You are not my tenant." In this case the rent had been received from an undertenant; and it was said, as it could not have been recovered as a debt, but only by putting a distress upon the premises, that ought to have the same effect. We think we ought not to go so far as that. If the landlord had been constrained to put in a distress, and had actually distrained, such would have been the result; but, inasmuch as he did not distrain, I think we ought not to carry the case beyond the point to which the decisions have already extended. It seems to me that the receipt of rent from an undertenant is not to be considered as having the same effect as a distress would have had. When a landlord goes on the premises and finds that rent is due from an undertenant who is not unwilling to pay it, and the payment by whom to him, as the superior landlord, would be a payment to his tenant, there is good sense in holding that such payment is not equivalent to a distress; because it amounts to no more than going and asking for the rent, and finding persons willing to pay the money, and taking it.

MARTIN, B.—I am of the same opinion. A receipt of rent, to operate as a waiver of a forfeiture, must be a receipt of rent due on a day after the forfeiture was incurred. The mere receipt of the money, the rent having become due previously, is of no consequence, and for the very plain reason that the entry for a condition broken does not at all affect the right to receive payment of a pre-existing debt. I entirely agree with what my Lord has said. We ought to endeavour not to allow technical consequences to be given to acts which were never intended to follow from them. I believe the rule laid down by Lord Coke is the correct one. Even if that were not so, in this case there

would be a good right to maintain the ejectment, for the non-insurance is a continuing breach, and its continuance during the period between the time of the payment of the rent on the 23rd of December and the commencement of the suit on the 24th is sufficient for the purpose of entitling the plaintiff to his verdict.

1859.  
PRICE  
9.  
WORWOOD.

CHANNELL, B.—I also agree in thinking that the rule should be discharged. This is an action of ejectment, and the writ was tested the 24th December last year. The plaintiff sought to recover in respect of one or other of two breaches of covenant; and, in order to entitle him to recover, it was necessary for him to shew a right to enter on the premises on the 24th December. The case turns on the breach of covenant for non-insurance. Now, to entitle the plaintiff to recover in respect of that, it is necessary for him to shew that the premises were uninsured on 24th December, 1857, and uninsured under circumstances which entitled him to take advantage of the forfeiture. Certainly, at the trial, I had some doubt whether there was any evidence of non-insurance on the 24th December of which the plaintiff could take advantage; my doubt being, if there had been some evidence to go to the jury of non-insurance during a considerable time, whether it had not been waived by what occurred on the 23rd December. Then, first, was there any evidence to shew a continuing breach? More than a year before the action was brought the defendant had been asked if he had insured, and was requested to produce his policy; he said that he had not insured. He was applied to again in the same year in which the action was brought, and he then not only stated that he was uninsured, but gave a reason, namely, that he wanted the money for other purposes. So far as we can judge, that

1859.  
PRICE  
v.  
WORWOOD.

which he gave as a reason for not insuring, viz. the want of funds, was a continuing cause, and, from what had taken place with respect to the non-payment of the rent, may be supposed to have continued. I therefore think there was evidence to go to the jury, not merely that the premises were not insured at the time that an application was made to the defendant upon the subject of the non-insurance, but that the same state of things continued afterwards. Then, supposing that to be so, was the forfeiture waived by what occurred on the 23rd? Now, on the 23rd December, the day before the action was brought, the plaintiff obtained from the undertenants payment of the rent due from them to their landlord, the present defendant, up to the preceding Michaelmas. Without entering into the question whether that is to place the plaintiff in a worse situation than if he had received it from his tenant; in other words, whether it is only evidence of a waiver of the forfeiture before the Michaelmas up to which rent was paid, or whether it brings the waiver down to the 23rd December; still, if I and the rest of the Court are right in our conclusion, there was evidence of a continuing breach between the 23rd, when the payment was made, and the time when the action was brought on the 24th. We have only to consider whether there was any evidence to go to the jury. I am of opinion that there was, and that the rule should be discharged.

Rule discharged (a).

(a) See Best on Presumptions of Law and Fact, pp. 55. 186.

1859.

REYNOLDS and Others, assignees of BATE, a Bankrupt,  
v. HALL.

April 20.

**TROVER.**—The first count alleged a conversion of the bankrupt's goods before the bankruptcy. Second count.—On a conversion of the goods of the plaintiffs as assignees after the bankruptcy.

Pleas.—First: That the plaintiffs were not assignees. Second: Not guilty. Third, to the first count: That the goods were not the goods of Bate. Fourth, to the first count: Leave and licence by Bate. Fifth: That the goods were not the goods of the plaintiffs as assignees.—Whereupon issues were joined.

The defendant gave notice that he intended to dispute the bankruptcy.

The cause was tried at the Spring Assizes at Shrewsbury in 1858, when a verdict was found for the plaintiffs, subject to a special case, in substance as follows:—

Bate, the bankrupt, was a wine and spirit merchant at Shrewsbury, and on the 18th of May, 1857, borrowed from the defendant 25*l.*; and on the same day, in order to secure the repayment thereof, and of any further sum not exceeding 50*l.*, executed a bill of sale, by way of mortgage, of all his goods. He had an interest, in right of his wife, in certain real property, but it was of no value, and was not conveyed or dealt with. The bill of sale comprised the whole of Bate's property, which was of the value of 190*l.* at the least. It contained a provision that Bate should enjoy quietly until default. The bill of sale was filed within twenty-one days. On the 27th of May a receipt for the

the goods were in the possession of the bankrupt as reputed owner with the consent of the true owner at the time of the bankruptcy, and therefore passed to his assignees.

A trader executed a bill of sale of his stock in trade and all his other effects to the defendant, an auctioneer. On the 17th of June, in pursuance of an arrangement between the parties, the defendant came on the premises of the trader and attempted to sell the goods, but there were no buyers and nothing was sold. The defendant then left the premises, and the trader remained there and continued to carry on business till the 22nd, when he committed an act of bankruptcy. The sale had been advertised, but it did not appear that the goods were advertised to be sold as the goods of the defendant. —*Held*, that notwithstanding the attempted sale

1859.  
REYNOLDS  
v.  
HALL.

further sum of 25*l.* was written on the bill of sale and signed by Bate. After the execution of the bill of sale Bate carried on business as usual, and the defendant did not take possession of any part of the property previously to the 17th of the following June. An arrangement was made between Bate and the defendant, by their mutual consent, that the defendant, who was an auctioneer, should sell the property by public auction on the 17th of June, and such sale was accordingly advertized by the defendant for the 17th, upon which day he came to Bate's house, where the property was, in order to sell it, but there were no bidders and nothing was sold, and the defendant went away again. Bate remained on the premises, his name remained over the door, and the business was continued until he shut up the house. Bate handed the licence to the defendant on the day of the intended sale on the 17th. The defendant attempted to prove that he directed the bankrupt's father, who lived with the son, but who died before the trial of the cause, to keep possession of the goods for him. The jury found that he gave no such directions, and that he had no possession until after the deed of assignment was executed on the 22nd, and that he done no act to determine that the goods, if in the order and disposition of the bankrupt, were not so with the consent of the defendant. During all this time Bate was indebted to divers persons in sums amounting to between 300*l.* and 400*l.* On the 22nd of June, Bate, being pressed by creditors, executed a deed of assignment of all his property to Edwards and Green. The trustees put a man in possession, and kept possession till the defendant took forcible possession. On the 23rd, the defendant served the bankrupt with notice that unless payment should be forthwith made he would proceed to recover the same by virtue of the bill of sale. On the 23rd, the following additional trust was inserted in the assignment of the 22nd: "Upon

trust in the next place to pay to W. H. Hall such sum as may be found due to him on the bill of sale of May, 1857." Bate then re-executed the deed, with the assent of the trustees. On the 26th, the defendant took forcible possession of the goods and sold them. On the 27th of June Bate was adjudicated a bankrupt, and the plaintiffs were appointed assignees.

1859.  
 REYNOLDS  
 v.  
 HALL.

The goods were of the value of 190*l*.; and the jury found a verdict for that sum, subject to this case.

The Court is to be at liberty to draw inferences of fact.

The questions for the opinion of the Court are (*inter alia*):—Did Bate commit an act of bankruptcy by giving a bill of sale? If not, did he when he executed the assignment on the 22nd or the 23rd of June?

Was the attempted sale of the 17th of June a withdrawal by the defendant of his consent to the goods being in the order and disposition of Bate?

According as the Court may answer the above questions, the verdict is to be entered for the defendant or the plaintiffs.

*Gray*, for the plaintiffs.—If a bill of sale, executed by way of mortgage, makes provision that the debtor shall retain possession for a time, and during such possession the debtor becomes bankrupt, the goods are in his order and disposition with the consent of the true owner, and will therefore pass to his assignees: *Freshney v. Carrick* (*a*), *Hornsby v. Miller* (*b*). The assignment of all his goods by Bate on the 22nd of June was an act of bankruptcy, which was not affected in any way by the re-execution of the deed on the 23rd of June; such re-execution could not affect the legal interest which had passed on the

(*a*) 1 H. & N. 653.

(*b*) 28 L. J. Q. B. 99.

1859.  
 REYNOLDS  
 v.  
 HALL.

22nd: see per *Holroyd, J.*, in *Doe dem. Lewis v. Bingham* (a). Down to the 17th the goods were clearly in the order and disposition of the bankrupt as reputed owner with the consent of the true owner, and the mere fact that the defendant, being an auctioneer, went into the house to sell the goods on the 17th of June did not put an end to the reputed ownership. [*Martin, B.*—What did the handbills say? If they stated that the goods were to be sold as the defendant's goods that put an end to the bankrupt's reputed ownership.] The defendant went out, leaving the bankrupt in possession as before, and such possession continued down to the 22nd, when he committed the act of bankruptcy.

*Huddleston*, for the defendant.—The bill of sale, being for a present advance, was no act of bankruptcy. On the 17th, the sale having been advertized, the defendant came to Bate's house, and had possession of the goods to sell them. It is not necessary that the true owner should take actual possession. It is enough if he does some act indicating an intention to take possession of the property, and that it should no longer remain in the possession of the bankrupt: *Brewin v. Short* (b). The deed was incomplete, and did not carry out the intention of the parties until the 23rd.

*Gray*, in reply.—Whatever the advertisements may have been, the question is, what was the state of things between the 17th and the 22nd of June. Bate was in possession of the stock in trade, and continued to sell the liquors, as apparent owner. The attempted sale by the plaintiff on the 17th was consistent with the continued possession of Bate.

(a) B. & Ald. 672. 677.

(b) 5 E. & B. 227.

1859.  
 REYNOLDS  
 v.  
 HALL.

**BRANWELL, B.**—We are of opinion that the plaintiffs are entitled to recover. If the handbills had announced that the goods were the property of the defendant, the fact would have been stated. The case only states that the sale was advertised. If the advertisement simply announced that the goods were to be sold, it would have no effect. Neither party has desired to have it set out, and therefore we must assume that it does not affect the question. The assignment operating from the day when it was signed, it was then an act of bankruptcy, which was not affected by what took place on the following day. The goods continued in the house, the bankrupt carrying on business and dealing with them. Their being in the house was the act of the true owner; and therefore they were in the order and disposition of the bankrupt with the consent of the true owner. Upon these grounds the plaintiffs are entitled to judgment.

**CHANNELL, B.**—On the 22nd of June a deed was executed, which was an act of bankruptcy. Its effect was not done away with by an alteration made in it on the 23rd, viz. the insertion of an additional trust. The only other inquiry is, were the goods in the order and disposition of the bankrupt? They were the stock in trade of a public house; the bankrupt's name was over the door as licensed owner. The advertisement of the sale did not destroy the apparent ownership, and was no withdrawal of the defendant's consent to its continuance. There will therefore be judgment for the plaintiffs (*a*).

Verdict to be entered for the plaintiffs.

(*a*) *Pollock*, C. B., and *Martin*, B., had left the Court.

1859.

May 9.

F. R. WITHERS v. ISABELLA PARKER, Executrix of  
G. S. PARKER.

P. having recovered judgment against F., the sheriff, on the 15th of April, seized F.'s goods in Hampshire, under a *fi. fa.* in that action, and left a man in possession. On the same day F. executed a bill of sale to W., and a writ of *fi. fa.*, in an action by W. against F., was lodged with the sheriff for execution. On the 1st of May, F. was taken in Middlesex under a writ of *ca. sa.* issued at the suit of P.,

**INTERPLEADER.**—The question was whether certain goods claimed by F. R. Withers were the property of the said F. R. Withers, by virtue of a bill of sale, dated the 14th of April, 1858, as against the writ of *fi. fa.* at the suit of Isabella Parker, executrix as aforesaid, &c.

At the trial, before *Martin, B.*, at the London Sittings after Hilary Term, it appeared that on the 16th of January, 1858, the now defendant recovered judgment for 305*l.* 12*s.* 4*d.* against one W. Frith. The action was a hostile one and was defended for Frith by the now plaintiff Withers, as attorney for Frith. Messrs. Bartholomew & Randall acted as the London agents of Withers. On the 23rd of March, 1858, a writ of *fi. fa.* in that action, indorsed to levy 305*l.* 12*s.* 4*d.*, was placed in the hands of the sheriff for execution. On the 14th of April in the same year a writ of summons was issued in an action of *Withers v. Frith* and

and thereupon P.'s attorney, at Southampton, immediately wrote to request the sheriff to withdraw from possession under the *ca. sa.* The officer received the letter, but his man continued in possession of the goods and did not in fact withdraw. The officer however told W. that he would hold for him under his writ. A summons to set aside the writ of *ca. sa.*, on the ground that it had been irregularly issued, "no return to the *fi. fa.*, under which the sheriff now holds the defendant's property having been made," was taken out on the 3rd of May, and on the 4th F. was discharged out of custody, and an order was made by consent that "P. should be at liberty to proceed on the *fi. fa.* under which the sheriff is in possession." The summons was taken out and the consent to the order given by R., the London agent of W., who was the attorney for F. in the action of P. v. F., upon F.'s instructions. W. knew nothing about the terms of the order at the time it was made, and when he heard of it took no steps to inform P. that he objected to it, or that it was made without his authority.—*Held*: That the sheriff's officer having continued in actual possession under P.'s writ, and the direction to the sheriff to withdraw having been countermanded before it was actually obeyed, W. acquired no right to the goods seized as against P.

*Per Pollock, C. R.* and *Martin, R.*, that W. was bound by the statement, "that the sheriff was in possession," contained in the order made in the cause of P. v. F., and consented to by R. as the London agent of W.

*Per Stowart, R.* and *Smith, per Charnock, R.*, that the statement of fact in the order was not binding on W. as evidence against him, in his private capacity, of the fact stated in it, by reason merely of his London agent having consented to it, and therefore that the admission did not affect the question of his title to the goods as against P.

judgment was signed for 207*l* 13*s.*, and a writ of fi. fa. was issued on the following day, the 15th. At 11 o'clock on the same day a bill of sale of all his goods was given to Withers by Frith. In March two writs of fi. fa. against the goods of Frith were in the hands of the sheriff of Hampshire: one at the suit of one Driver, which came to his hands on the 8th of March; the other, the above mentioned writ, at the suit of Parker. The sheriff had seized and was in possession of certain goods of Frith, which were outside the house, under the writ at the suit of Driver, and on the 15th of April, about 12 o'clock, he seized the goods of Frith inside the house, under Parker's writ. On Saturday the 1st of May Frith was arrested in Middlesex under a ca. sa. at the suit of Parker, but at this time the writ of fi. fa., under which the levy had been made, had not been returned. Notice of the arrest was given on the same day to Parker's attorney at Southampton. On the same 1st of May, a clerk in the office of Parker's attorney, then carrying on business at Southampton, addressed the following letters to Lisle, the sheriff's officer:—

**"Dear Sir,**

“Parker v. Frith.—I have just received a message from London that this defendant is arrested. You must therefore withdraw the writ of *fi. fa.*

**"Mr. Lisle."**

“Yours truly,  
“R. S. Pearce.”

**"Dear Sir,**

“ Re Frith.—The man in possession under the warrant must be withdrawn to-night. Let it be done immediately. I wrote you a note at one o'clock and sent to several parts of the town, hoping to have seen you ere this.


**"Yours truly,**

**"Mr. Lisle."**

**"R. S. Pearce."**

**Goddard, Lisle's assistant, continued in possession and**

**MM 2**

1859.  
  
 WITHERS  
 v.  
 PARKER.

1859.  
 WITHERS  
 v.  
 PARKER.

did not in fact withdraw. On the 3rd of May Lisletold Withers that he would hold for him under his writ of execution. On the same day Messrs. Bartholomew & Randall, as the London agents of Withers, took out a summons, in the action of *Parker v. Frith*, for Frith's discharge from custody, on the ground that the writ of *ca. sa.* issued against him had been irregularly issued, "no return to the writ of *fi. fa.*, under which the sheriff of Hants now holds possession of the defendant's property, having been made."

On the 4th of May, being the day on which the summons was returnable, Frith was discharged out of custody, and the following order was made by *Martin, B.*, at Chambers:—

<p>"Parker, executrix, &amp;c.          v.          Frith.</p>	}	<p>Upon hearing the attorneys or          agents on behalf of the plaintiff          and defendant: by consent, I do</p>
--	---	--

order that upon payment of 305*l.* 12*s.* 4*d.* the debt and costs due from the defendant to the plaintiff, for which this action is brought, together with interest thereon at the rate of 4*l.* per cent. per annum, from the 16th day of January, 1858, on the 4th day of July next, no writ of *ca. sa.* be issued against the defendant, but in the meantime the plaintiff shall be at liberty to proceed on the *fi. fa.* already issued, and under which the sheriff of Hants is in possession," &c.

The summons was taken out and the consent to the order given for Frith's discharge by Messrs. Bartholomew & Randall, upon Frith's instructions to them personally given, and without any special authority from, and without the actual knowledge of Withers.

The following correspondence took place between the plaintiff Withers, and Messrs. Bartholomew & Randall in reference to such order:—

" Gray's Inn, 4th May, 1858.

" Dear Sirs,

" Frith *ats.* Parker.—The plaintiff's attorneys con-

sented to the summons to discharge the defendant. They are to remain in possession under their fi. fa., and are restricted from issuing another ca. sa. for two months.

“Messrs. Withers & Randall,  
“Southampton.”

“Yours very truly,  
“Bartholomew & Randall.”

“Southampton, 5th May.

“Dear Randall,

“You will have had my letter by the day mail: of course it was not intended that after the withdrawal of the officer I should be postponed, &c.

“Mr. Harfield, who acts for me, claims for me the money in the hands of the sheriff’s auctioneer, and has given notices. I do not understand how a consent could have been given to prejudice me as an execution creditor, as it would do if they were to repossess, &c.

“Yours truly,

“E. B. Randall, Esq.”

“F. R. Withers.”

Parker had no notice of this correspondence, nor did Withers inform her that the order was incorrect, or that he objected to it, or that it was made or agreed to without his authority. The goods so seized were afterwards claimed by Withers under his bill of sale.


Under the direction of the learned Judge a verdict was entered for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him, the Court to have power to draw inferences of fact.

*Collier* having obtained a rule nisi accordingly,

*Montague Smith* and *H. Bullar* now shewed cause.—Withers claims under a bill of sale executed before the seizure, but after the delivery of Parker’s writ to the sheriff. The property was bound by the delivery of the writ to be executed on the 23rd of March. The title

1859.

WITHERS  
v.  
PARKER.


1859.  
  
 WITHERS  
 v.  
 PARKER.

of Parker is not affected by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 1), because Withers at the time of the execution of the bill of sale was acting as attorney for Frith, the execution debtor, and had notice that the writ was in the hands of the sheriff to be executed. The question arises on the 29 Car. 2, c. 3, s. 16, and it will be contended on the other side that, inasmuch as the execution of the writ was countermanded, it was no longer in the hands of the sheriff *to be executed*. But the sheriff's officer was actually in possession under the warrant in the action of *Parker v. Frith*. In *Hunt v. Hooper* (a) the writ was never in the sheriff's hands to be executed. Here the sheriff's officer never actually withdrew from possession. The clerk of a plaintiff's attorney has no authority, without special instructions, to withdraw an execution. So far as the letters of the attorney's clerk were an authority to withdraw they were never acted upon, but were superseded by an order of the Court, made by the consent of all parties on setting aside the writ of ca. sa. [*Brambrell*, B.—The officer acted for the execution creditor, who ratified his act in remaining in possession.] The bargain bound all parties. On the other side it will be said that Messrs. Bartholomew and Randall had no authority to enter into the arrangement so as to affect the interest of Withers in his individual capacity or bind him personally. But a London agent acts for all purposes for the attorney in the country. [*Martin*, B.—It is difficult to see why Withers should not be bound by an order consented to by his own London agent.]

*Collier* and *W. M. Cooke*, in support of the rule.—In *Hunt v. Hooper* (a) the writ was delivered to the sheriff to be executed on the 1st of June, and on the 2nd of June the direction to execute it was countermanded. Here the

(a) 12 M. & W. 664.

execution creditor directed the sheriff's officer to withdraw. The officer assented to hold for Withers. If he had executed Parker's writ on the day after the countermand he would have been a trespasser. [*Bramwell*, B.—*Parke*, B., in *Hunt v. Hooper* (a), puts the case in the same way that you do.] Parker's writ, not being at that time in the sheriff's hands to be executed, the other writs in his hands became entitled to priority. Assuming that the sheriff disobeyed the instructions of Parker's attorney and did not in fact withdraw from possession, his disobedience cannot affect the rights of third parties. Therefore the withdrawal, such as it was, had an effect. The order which was made subsequently does not interfere with the effect of that withdrawal. Taking Frith under the ca. sa. was an abandonment of the fi. fa. [*Bramwell*, B.—Viewed intrinsically, the order was not binding against Withers. Then, how can it be evidence against him when he knew nothing about it? Withers was bound by his agent having consented to that order so far as it operated in the cause in which it was made.] The order not being binding against Withers, and the writ having been withdrawn, his bill of sale takes precedence of Parker's writ.

1859.  
  
 WITHERS  
 v.  
 PARKER.

POLLOCK, C. B.—We are all of opinion that the rule to set aside the verdict for the defendant and to enter the verdict for the plaintiff must be discharged. The sheriff's officer was at one time in possession on behalf of Parker under the writ of fi. fa. in *Parker v. Frith*. At that time there can be no doubt that Withers could not have maintained the present claim. A writ of ca. sa. was issued against Frith, which turned out to be irregular and was set aside. Now the natural and proper consequence which one would expect under such circumstances, unless some


(a) 12 M. & W. 672.

1859.  
WITHERS  
v.  
PARKER.

new rights had intervened, would be that the writ being bad and having been set aside, it would have no more effect than if it had never existed; in which case it is quite clear that the plaintiff Withers could not have succeeded, and the verdict for the defendant in this action would have been quite right. But it is said that the officer who held under the fi. fa. for Parker went out of possession. The officer said he did not. In fact nothing was done. There was no outward and visible sign of his going out; Parker was restored back to her former position, or, rather, never lost the possession which she had; since the writ of ca. sa., which was supposed to have affected her right of possession, was set aside. On that ground alone it appears to me that the present rule ought to be discharged.

It is however of some importance to consider what is the effect of a rule made in a cause by the consent of the agent of an attorney professing to act for the attorney. I think that if such a rule be made which affects the interest of the attorney, he ought, if he objects to it, instantly to make an application to get it altered so that it may not prejudice him. To say he is not a party but only the attorney, and therefore he cannot be bound by it, nor can it operate against him, appears to me to assume the whole matter. An order is made with the consent of the agent professing to act for the attorney in the cause, a part of which order is a statement and an admission that the officer was actually then in possession. I think that is a matter which the attorney cannot gainsay for his own personal benefit. If he knew of it, and consented to the order for the purpose of taking a benefit, it would be a fraud. Here there was no fraud; but I think that if the attorney in a suit consents to an order, it is of considerable importance that we should not allow a distinction to be made between his assent and the assent of his agent. It might lead to very inconvenient

consequences if we did not consider, for the purposes of a suit, the attorney and the agent identically the same person.

1859.  
  
 WITHERS  
 v.  
 PARKER.

MARTIN, B.—I am of the same opinion. The present plaintiff, Withers, was the attorney for one Frith in an action brought against him by Parker. On the 23rd of March, Parker having recovered judgment against Frith, a warrant upon a fi. fa. was delivered to the sheriff's officer, under which he afterwards put his man, one Goddard, in possession. On the 15th of April a bill of sale was executed and judgment was obtained, and a writ of execution issued at the suit of Withers against Frith. About the 1st of May Frith was arrested under a ca. sa. at the suit of Parker, which was irregular because the writ of fi. fa. had not been returned; and accordingly one Pearce, the clerk of Parker's attorney, wrote a letter to Lisle, the sheriff's officer: "I have just received a message from London that the defendant is arrested; you must therefore withdraw the writ of fi. fa." This letter did not reach Lisle in the morning, and at 5 o'clock in the afternoon the clerk wrote again: "The man in possession under our warrant must be withdrawn to-night. Let it be done immediately." Lisle seems to have received that letter late on Saturday evening. He did not withdraw the man that night. On the following Monday morning he went to Withers, and he says that Withers told him to act upon his writ. Lisle swore positively that he never withdrew from possession in respect of Parker's writ; that he always held under it and kept the man in possession under it. It may be that he swore falsely. Mr. Collier did not desire that the question of Lisle's credibility on this point should be put to the jury. If it had been, I think that the jury would have believed the truth of the story which Lisle told and on which he acted.

1859.  
~  
WITHERS  
v.  
PARKER.


The next step is that, on the 3rd of May, Messrs. Bartholomew & Randall, the agents for Withers the defendant's attorney in the case of *Parker v. Frith*, took out a summons to set aside the ca. sa. I protest against any distinction being drawn between the act of a London agent and the act of the country attorney. The effect is precisely the same as if Withers had taken out the summons himself. The summons was to shew cause why the defendant should not be discharged out of the custody of the sheriff of Middlesex as to this action, on the ground that the ca. sa. on which he had been arrested had been irregularly issued, "no return to the writ of fi. fa. *under which the sheriff now holds possession* of the defendant's property having been made." So that upon the 3rd of May Withers stated that the sheriff held possession of the defendant's property under the writ. An order was afterwards drawn up by consent, and part of the order is that Parker "is to be at liberty to proceed on the fi. fa. under which *the sheriff is in possession.*" Yet it is now said that the sheriff was not in possession, but, on the contrary, by reason of the supposed withdrawal, must be treated as having been out of possession. The sheriff's officer swore he never did go out; and the order consented to by Withers confirms what he said.

BRAMWELL, B.—I am of the same opinion, though not without some doubt. I do not found my judgment upon the order: I think the order, and the terms of it, ought to have no bearing on the question. In my opinion an order consented to by a London agent ought to be considered as valid as though consented to by the attorney who is to be bound by it. Therefore this order would as effectually bind the parties between whom it was made as though Withers himself had consented to it. But Withers is no party to

the order, and is therefore not bound by its intrinsic effect. The distinction I desire to make is,—that if Withers himself had consented to the order for his client, saying, “My client insists on my consenting to the order in terms, but I do not admit the statement in the order to be true,” he would not have been bound by it. If he consented without making such a stipulation, it would be a very dishonest act to turn round and say, “It is true I consented as attorney; as attorney I am bound: but I am Withers, and as Withers I deny the statement:” and I should have said that his denial ought not to be listened to. Here the order was consented to by his agent, and therefore we have nothing to do with the consequences which would follow from his personal assent, so far as they relate to his honour and character. Suppose he had been ill and his clerk had consented to an order containing a statement that “the goods were sold:” Withers might well say, “I am very sorry for this; my clerk has agreed to a statement in the order which, if I had been there, I never should have consented to: it was untrue.” That is the distinction I am endeavouring to draw. The order is as binding in the cause for the purposes for which it is made as if Withers had personally consented to it; but the statement of facts ought to be binding on him in his private capacity only so far as he could be shewn to be personally responsible for it; and therefore I do not think that in this case the order ought to have any effect upon his rights. I quite concur with my brother *Martin* that nothing could be more disastrous than that an order consented to by a London agent should be less binding, or different in its effect from one consented to by the country attorney.

The ground upon which my judgment proceeds is this. *Mr. Collier* says there was a time, after the bill of sale was given, when the writ was no longer in the hands of the

1859.  
WITHERS  
v.  
PARKER.

1859.  
  
 WITHERS  
 v.  
 PARKER.

sheriff to be executed,—when the sheriff, though in possession under it, was a trespasser. But, notwithstanding the countermand, the officer persisted in continuing in possession. The facts are—that a writ of *fi. fa.* is put into the hands of the sheriff to be executed; he seizes; and is afterwards told to withdraw, but does not do so, and continues in possession under the authority of the writ, and the person who originally put the writ into his hands for execution assents to it. It is a question that has arisen for the first time, and I am not clear about it; but it appears to me that the ratification which the execution creditor gave to what is said to have been the unauthorized act of the sheriff, is equivalent to a withdrawal of the countermand and a confirmation of the act of the sheriff. Suppose, immediately after Lisle had got the order to withdraw, A. had gone to the officer and said, “I am come from Parker, who recalls what she said: continue in possession;” and suppose A., who brought the message, had not been authorized by Parker to do it, but Parker, upon hearing it, said, “I am very glad; I will ratify all A. has done in my name, and therefore I will make his act mine;” it seems to me, on principle, and according to the rule laid down in *Wilson v. Tumman* (a), that in such case the unauthorized statement of A. might be ratified by the execution creditor. Why, then, may not the sheriff say, “I have got your orders, but I will not withdraw. I will continue to act under the writ.” And if the execution creditor says, as in the case I put of a countermand by A., “I ratify all you have done,” why should not the act of the officer itself be good? I can see no reason. The officer not having withdrawn, as he was ordered to do, but continuing in possession in the name of Parker, and Parker subsequently ratifying his act, the effect is to cancel the original order

(a) 6 M. & G. 236; see p. 242.

to withdraw and to make the entire proceeding by the officer a proceeding under the authority of Parker; so that the writ was never in the hands of the sheriff not to be executed, because the order not to execute was either countermanded or annihilated. That is the ground upon which I think that the defendant is entitled to the verdict.

1859.  
~  
WITHERS  
v.  
PARKER.

CHANNELL, B.—I am also of opinion that this rule ought to be discharged. I come to that conclusion very much upon the grounds stated by my brother *Bramwell*. The issue is whether the goods were the goods of Withers as against the defendant's testator. Now up to the 1st of May the sheriff was in possession of the goods under Parker's execution. There was a bill of sale to Withers, dated the 14th of April and executed on the 15th. I assume that the sheriff was constructively in possession under Withers' writ of execution. Now, the bill of sale being executed on the 15th of April, if nothing had occurred to alter the position of Parker the bill of sale could not have prevailed against Parker's execution. Then, it is said, on the 1st of May, the clerk of Parker's attorney wrote two letters, which came to Lisle, the officer of the sheriff; that they amounted to a direction to him to withdraw, and that therefore the writ of execution was at an end. It is not necessary to consider what would have been the effect if Lisle, or Goddard who was left in possession, had actually withdrawn, or what would have been the state of things if a sale had taken place before the 4th of May, because in point of fact Lisle says he "never did withdraw." He cannot be understood as meaning only that he did not withdraw from the premises, because as he was holding under both writs there was no doubt that he did not in fact withdraw. The sheriff continued in possession with the full assent of Parker, and it appears to me that what

1859.

WITHERS  
v.  
PARKER.

took place amounted to a countermand by Parker of the direction to withdraw before it had been carried into effect. That left the parties in the same situation as if the letters of the 1st of May had never been written or received. I regret that I am not able to attach the same legal importance to the order of the 4th of May as the Lord Chief Baron and my brother *Martin* have done.

Rule discharged.

May 11.

MASON v. TUCKER.


The plaintiff, who lived more than twenty miles from the defendant, sued the defendant for a debt of 15*l.*, for which a plaint might have been entered in a County Court, and was non-suited. The Judge did not certify that the action was fit to be tried in a superior Court.—*Held*, that the defendant was not entitled to costs as between attorney and client by 9 & 10 Vict. c. 95, s. 129.

*Seem*, that under the section in question the Judge may certify at any time after the trial.

THE writ in this case was indorsed to recover the sum of 15*l.* alleged to be due to the plaintiff for commission in procuring a transfer of a mortgage for the defendant. The declaration was for work and labour and commission. The defendant pleaded, except as to 5*l.*, never indebted, and the Statute of Limitations; and, as to 5*l.*, payment into Court. After issue joined, the plaintiff took out a summons to shew cause why the action should not be tried before the sheriff, which was opposed by the defendant; and an order was made thereon by *Martin*, B., on the 29th of October, that the "summons should be dismissed, the plaintiff's costs to be taxed on the higher scale from that date if he obtained a verdict." The defendant resided at Bishop's Stortford, more than twenty miles from the plaintiff. The cause having been tried the plaintiff was non-suited. The Master taxed the defendant his costs on the higher scale as between attorney and client.

*Kerr* now moved for a rule to review the Master's taxation.—The 9 & 10 Vict. c. 95, s. 128, gives concurrent jurisdiction to the superior Court and the County Court

in certain cases, and enables the party to sue in either at his option. The 129th section enacts "that if any action shall be commenced after the passing of this Act in any of her Majesty's superior Courts of record for any cause, other than those lastly hereinbefore specified, for which a plaint might have been entered in any Court holden under this Act, \* \* \* and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless the Judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior Court." The causes "lastly hereinbefore specified" are the causes of action mentioned in the 128th section.

1859.  
  
 MASON  
 v.  
 TUCKER.

*Hawkins* shewed cause in the first instance.—The causes of action mentioned in the 128th section and referred to in the 129th as "lastly hereinbefore specified," are causes of action not arising wholly or in some material point within the jurisdiction within which the defendant dwells or carries on his business, or where any officer of the County Court is a party. The fact that the plaintiff dwells more than twenty miles from the defendant forms no part of the "cause of action." The effect of the enactment is that in cases where the plaintiff might have sued in the County Court, and the action is brought in the superior Court, if the plaintiff does not succeed he must pay the defendant's costs as between attorney and client, unless the Judge certifies on the back of the record that the action was fit to be brought in the superior Court.

POLLOCK, C. B.—We are all of opinion that the rule to review the taxation must be made absolute. It is quite impossible to suppose that, while the 128th section gives to the plaintiff the right to sue in the superior Court, the

1859.  
 MASON  
 v.  
 TUCKER.

legislature, by the 129th section, intended to subject him to costs as between attorney and client if he exercised that right.

MARTIN, B.—The language of the 129th section is evidently meant to exclude the case where the parties dwell more than twenty miles from each other. The action was one very proper to be tried in a superior Court, and I should have been quite prepared to have certified now if it had been necessary.

BRAMWELL, B.—All cases “lastly hereinbefore specified” are excepted. That includes all those mentioned in the 128th section.

WATSON, B., concurred.

Rule absolute.

May 6 & 9.

BEDFORD v. BAGSHAW.

By the rules  
 of the Stock  
 Exchange  
 for 1853, the

**D**ECLARATION.—That before the committing of the grievances the defendant and divers other persons had


committee will not fix a settling day for the shares in a mining Company, or permit the same to be inserted in the official list, unless it has been represented to them that the subscription list is full, with the exception of such shares as are reserved for special purposes, and that not less than two-thirds of the scrip have been paid upon. The defendant, one of the directors of a mining Company, formed to consist of 100,000 shares of 1*l*. each fully paid up, having in conjunction with others falsely and fraudulently caused it to be represented to the committee of the Stock Exchange that 41,711 shares had been allotted, and that 40,911*l*. was in the hands of the Company's bankers, having been paid upon the scrip, 40,000 shares being reserved as the price to be paid for certain land, and 19,000 for distribution in the colony, the committee caused a settling day to be appointed and the shares to be quoted in the official list. The plaintiff knowing the rule of the Stock Exchange and, from seeing the shares quoted, believing that two-thirds of the scrip had been paid upon, bought on the Stock Exchange from third persons 200 shares in that belief. It was proved that no more than 19,183 shares were allotted and only 7000 were ever paid upon, and that the defendant knew this at the time of the representation to the Stock Exchange. The shares turned out to be valueless.—*Held*, that an action was maintainable by the plaintiff against the defendant for the false and fraudulent representation made by him.

associated themselves together as a Company called "The Lake Bathurst Australian Gold Mining Company," established or alleged to be established on the cost book system, for working certain deposits of alluvial gold and the mines of gold quartz alleged to have been discovered on 500 acres of freehold land purchased by the said Company in Australia; and the defendant and the said other persons, assuming and representing themselves to be the board of management of such Company, allotted and issued divers large quantities of shares of and in the said Company; and also issued, published and circulated, for the purpose of inducing persons to take shares in the said Company, a prospectus and advertisement, in which it was, amongst other things, stated and represented that the capital of the Company was 100,000*l.* in 100,000 paid up shares of 1*l.* each, without any further call or liability: that before and at the time of issuing the prospectus, and from thence until this suit, it was publicly known and understood, as the defendant well knew, and as the fact was, that the committee of the Stock Exchange in London would not appoint a settling day for shares in any mining Company, or permit the same to be inserted in the official list of the said committee, until it had been represented to the said committee, and the said committee had been induced to believe, that the subscription list of such Company was full, with the exception of such shares as might be reserved for special purposes, that not less than two-thirds of the scrip had been paid upon and were ready to be issued, and that there was no impediment to the settlement of the account: that the defendant and the said other persons, in order to procure the insertion of the shares of the Company in the official list of the committee, and to induce the committee to appoint a settling day for the said shares, and to induce persons to purchase the same in the belief that their inser-

1859.

BEDFORD

v.  
BAGSHAW.

1859.  
  
BEDFORD  
v.  
BAGSHAW.

tion in the said list had been procured by fair, honest and proper means, after the issuing of the said shares and prospectus, and before the making of the purchase by the plaintiff hereinafter mentioned, falsely and fraudulently represented to the said committee that 40,000 shares had been and were bonâ fide reserved for the purpose of completing the purchase of the said land, that 19,289 shares had been and were bonâ fide kept for circulation in the said colony of Australia, or for such other purposes as might be resolved upon thereafter, and that the residue, that is to say 40,711 shares, had been paid upon, and for all of which scrip certificates had been issued or were ready for delivery: and in order to induce the said committee to believe the said representations, the defendant and the said other persons falsely and fraudulently represented to the said committee that the produce of the said 41,711 shares had been received by them, and was then in the hands of their bankers and to the credit of the defendant and the said other persons as directors of such Company; and thereby the defendant and the said other persons, for the purpose and to the intent aforesaid, induced the said committee, and the said committee were thereby induced, to believe the said representations to be true, and that there was no impediment to the settling of the account; and, influenced by and acting upon such belief, the said committee did, before the said purchase by the plaintiff hereinafter mentioned, insert the shares of the said Company in the official list of the said committee and appoint a settling day for shares in the said Company: that afterwards, and before this suit, and whilst the shares continued to be inserted in the official list, the plaintiff, having notice of the prospectus and advertisement, and having seen the shares quoted and inserted in the official list of the committee of the Stock Exchange, and believing thereby that

the same had been admitted and inserted in such official list by fair, honest and proper means, and that the subscription list of the Company was full, with the exception as aforesaid, and that not less than two-thirds of the scrip of the Company had been paid upon, and either had been issued or were ready to be issued, and relying thereon, was thereby induced to purchase, and did purchase, in the Stock Exchange in London, 200 shares in the Company for 100*l.*, and paid 5*l.* for commission on such purchase; and the plaintiff from the time of such purchase has held, and now holds, the said shares so purchased by him as aforesaid, the same being shares issued by the defendant and the said other persons as aforesaid.—Averments: that the defendant at the several times aforesaid, by the several representations hereinbefore mentioned, deceived and defrauded the plaintiff in this, that at the time of making the said representations to the committee of the Stock Exchange, or at the time when the shares of the Company were inserted in the official list of the said committee, and when the plaintiff saw the same so inserted, or at any other time, 40,000 shares, or any shares, had not been bonâ fide reserved for the purpose of completing the purchase of the said land, nor had the 19,289, or any, shares been bonâ fide reserved for circulation in the said colony, nor had the 41,711 shares or two-thirds of the said scrip been subscribed for or paid upon, nor were the same issued or ready for delivery, nor had the produce thereof been received by, nor was it in the hands of, the said bankers, and the said shares ought not to have been inserted in the official list, all which the defendant always well knew. By means whereof &c.—There was a second count for falsely and fraudulently representing that the Company was likely to be a safe and profitable undertaking.

Pleas.—First: Not guilty. Second: That the plaintiff


1859.  
  
 BEDFORD  
 v.  
 BAGSHAW.

was not induced to purchase the shares as alleged. Third, to the first count: Denial of whatever is therein alleged as to the practice or proceedings of the committee of the Stock Exchange, and as to the public knowledge and understanding thereof, and the knowledge thereof by the defendant. Fifth: Statute of Limitations.

At the trial, before *Pollock*, C. B., at the sittings in London after Hilary Term, the plaintiff proved that, having seen the shares of "The Lake Bathurst Australian Gold Mining Company, in 100,000 shares of 1*l*. each," quoted in the printed list of the Stock Exchange and in the newspapers, finding them low in price, and knowing that a large portion of the capital must have been paid up to entitle them to such quotation, he bought 200 shares for 100*l*., and paid 5*l*. for brokerage. He said that he believed the scheme would not be a successful one, but having been informed by his brokers that two-thirds of the capital must have been paid up, and relying on the quotation in the official list, he felt satisfied that there would be sufficient to pay the shareholders 15*s*. a share. It further appeared that 150 of these shares had been issued to Messrs. Harvey and Iron, the persons who had contracted to sell to the Company the land mentioned in the declaration for 20,000 shares and 20,000*l*., to be paid by certain instalments, when the shares should have been allotted, and 20,000*l*. should have been paid to the bankers of the Company; and that the shares had been delivered to such persons under an agreement that they should not send them into the market.

It appeared from the evidence of the secretary that the defendant was present as chairman at a meeting of the board of directors on the 16th of March, 1853, when the secretary reported that 19,183 shares had been allotted to applicants, but only 6748 had up to that time been actually paid upon; and it was resolved that a further allotment of

14,500 shares should be made; and as it appeared that notwithstanding such extra issue the requirements of the Stock Exchange Committee on the granting a settling day would still not be met, it was resolved "that steps be taken to issue shares to the public to the amount necessary, and that in the meantime the members of the board undertake to provide the funds, to be repaid by the sale of the shares." At a meeting of the board on the 10th of April, at which the defendant presided, it was ordered that Messrs. Foster, the brokers of the Company, should apply to the committee of the Stock Exchange for a settling day, and that the following letter should be sent to the secretary of the Stock Exchange, which was done accordingly.

1859.  
  
 BEDFORD  
 V.  
 BAGSHAW.

"April 12.

"M. Slaughter, Esq., Secretary to the Stock Exchange.

"Sir—In reply to yours of the 10th, I beg to forward you the following particulars relating to the above Company. That 41,711 shares have been paid up, for all of which scrip certificates have been issued or are ready for delivery on application at the office as advertised in the 'Times;' that the Company have made a reservation of 40,000 shares for the purpose of completing the purchase of land &c., as agreed on with the vendors, which shares are in the hands and under the control of the directors, to be applied to that purpose only; that the residue of the shares, amounting to 19,289, being less than one-third, are kept for circulation in the colony or such other purposes as may be resolved on hereafter. I beg also to enclose two certificates from the Company's bankers, &c. It will be seen from the constitution of the Company that no deed is required.

"Yours &c.,

"R. Poney, Secretary."

The letter was accompanied by the bankers' certificates,

1859.  
BEDFORD  
v.  
BAGSHAW.

stating that 40,911*l.* 4*s.* 2*d.* stood to the credit of the directors of the Company in their books.

This letter was in answer to one written by the secretary of the Stock Exchange, as follows.

“ Sir—Application having been made to the committee of the Stock Exchange to appoint a settling day in the shares of the Lake Bathurst Australian Gold Mining Company, I beg to inform you that in such cases we are accustomed to require from the secretary of the Company a certificate to the effect following; viz. that the subscription list is full, with the exception of such shares as may be reserved for special purposes; that not less than two-thirds of the scrip have been paid upon and all ready to be issued, and that the period publicly advertised for signing the deeds has expired. In addition to this certificate the committee require that the Company’s bankers shall acknowledge to have received funds equal in amount to the deposits on the two-thirds scrip issued. May I therefore request the favour of your forwarding such certificate and voucher to this department, with any information on the subject which you may deem useful and satisfactory to the committee.

“ Your’s &c.,

“ R. Poney, Esq.

“ M. Slaughter, Secy.”


Messrs. Foster, the Company’s brokers, at the same time applied to the Committee for General Purposes of the Stock Exchange to fix a settling day. The letter of the 12th of April was considered unsatisfactory, and the committee at first declined to name a settling day; but eventually, after further communication with Messrs. Foster, a settling day was appointed. It was admitted that, with the exception of 7000*l.*, the whole of the money was withdrawn from the bankers within a few days after the 12th of April, and that no more than 7000 shares were ever paid upon.

The facts having been discovered by the committee of the Stock Exchange in December, 1853, the name of the Company was erased from the list and the shares ceased to be quoted. It was proved that the rules of the Stock Exchange were as stated in Mr. Slaughter's letter. A deposition of the defendant, sworn in the matter of winding up the Company, was put in, in which he stated that he had given his own check for 3000*l.* to enable the bankers to give a certificate as to the funds of the Company, to be produced to the Committee of the Stock Exchange in order to obtain a settling day, and that he got a friend to lend 10,000*l.* for the same purpose. The shares turned out to be valueless.

On this evidence the defendant's counsel objected that there was no evidence to go to the jury: that it appeared that the letter of the 12th of April was considered unsatisfactory by the committee of the Stock Exchange and was not acted upon, and therefore that the defendant did not make the representation that induced the committee to insert the shares in the list: that the shares purchased by the plaintiff were issued in fraud of the defendant and of the Company. And lastly, that the representation not being made by the defendant to the plaintiff himself was not a ground of action. The jury, under the direction of the learned Judge, found a verdict for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him.

*O'Malley*, in this Term, obtained a rule nisi to enter a verdict for the defendant, on the ground that there was no evidence of such a representation as would entitle the plaintiff to recover: that the committee of the Stock Exchange did not act on the representations of the defendant: that a representation made to the committee of the Stock Exchange and not to the plaintiff, or the public, is too remote to ground an action upon; and that with respect to

1859.  
BEDFORD  
v.  
BAGSHAW.

1859.  
  
 BEDFORD  
 v.  
 BAGSHAW.

150 of the shares they were issued in fraud of the defendant and the Company; or why the judgment should not be arrested, on the ground that the connection between the act complained of and the act of the plaintiff by which the loss was sustained does not sufficiently appear.

*Bovill, Holl and Tayler* shewed cause.—First, it is said that the plaintiff is not entitled to recover, because the shares were not quoted in the official list in consequence of the representation shewn to have been authorized by the defendant, but in consequence of further communications made by the brokers of the nature of which there was no evidence. But, unless the defendant had caused the false representations to be made, no settling day would have been appointed. There is no proof that the brokers were guilty of any fraud and nothing of the kind can be presumed. Many cases shew that it is not necessary, in order to constitute a cause of action, that the false representation should have been made immediately to the party who acts upon it. It is enough if the false representation is made with the intent that the person to whom it is made shall make it public. *Polhill v. Walter* (a), *Levy v. Langridge* (b) and *Gerhard v. Bates* (c) are instances of the application of that principle. In *Pilmore v. Hood* (d), the defendant, being about to sell a public house, falsely represented to B., who had agreed to purchase it, that the receipts were 180*l.* a month. B. having told the knowledge of the defendant communicated this representation to the plaintiff, who became the purchaser instead of B., it was held that an action lay against the defendant at the suit of the plaintiff. That case closely resembles the present, because the defendant here by fraud induced the committee of the Stock Exchange to make public a representation

(a) 3 B. & Ad. 114.

(b) 4 M. & W. 337.

(c) 2 E. & B. 476.

(d) 5 Bing. N. C. 97.

which he knew to be false. *Scott v. Dixon* is an authority in favour of the plaintiff. [Bramwell, B.—Another point is, that the shares bought by the plaintiff might not have been sold by the parties to whom they were issued, but I do not see how that is material.]

1858  
—  
Bramwell  
v.  
Barnes & Co.

*O'Malley*, in support of the rule.—*Scott v. Dixon* is distinguishable from the present case, because there the defendant put a written document into the hands of the brokers to be shewn to the persons intending to become purchasers. Here, the defendant did not intend that the particular information communicated to the committee of the Stock Exchange should be made public, and in fact it was never published to the plaintiff. [Bramwell, B.—Suppose a lecturer falsely represented that a medical student had attended lectures, and upon such representation the student was examined and got his diploma, would an action lie by a person who afterwards employed him. *Pellett, C. B.*—There it is made a condition that students shall not be examined without having attended lectures. The attendance is a *sine quâ non*, but not a *causa causans*.]

MARTIN, B.—I am of opinion that the rule must be discharged. I think that the case is concluded, so far as we are concerned, by the proceedings in the Exchequer Chamber in the case of *Seymour v. Bagshaw* (b).

BRAMWELL, B.—I am of the same opinion. The judg-

(a) Q. B. Hil. T. 1859.

(b) 18 C. B. 903. This case was tried before *Jervis, C. J.*, in Trinity Vacation, 1855, when a verdict was found for the plaintiff. A bill of exceptions was tendered

and the case afterwards came before the Exchequer Chamber, and ultimately, in June 1858, the judgment was affirmed in the House of Lords without argument.

1859.  
BEDFORD  
v.  
BAGSHAW.

ment in the Exchequer Chamber in *Seymour v. Bagshaw* did not pass *sub silentio*. I consider myself concluded by it. I entirely approve of the case of *Scott v. Dixon*, but I think that this case is distinguishable from it. It would be a strong thing to hold that if a man makes a verbal untrue statement to any person, as, for instance, that the shares in a particular Company are a valuable security, if that person buys and recommends his friends to buy, that he is to be liable to any one who buys on the faith of such representation. But it is not a bad rule that a person who makes a fraudulent representation, which is intended to be generally circulated, shall be liable to any person injured by acting upon it however remote the consequences may be. If the rule is wrong it must be questioned in a Court of Appeal.

POLLOCK, C. B.—I also think that the rule must be discharged. There was evidence to go to the jury. The defendant acted fraudulently, and made representations to the committee of the Stock Exchange with a view to induce persons to believe the existence of a particular state of things as to these shares. All persons buying shares on the Stock Exchange must be considered as persons to whom it was contemplated that the representation would be made. I am not prepared to lay down, as a general rule, that if a person makes a false representation every one to whom it is repeated, and who acts upon it, may sue him. But it is a different thing where a director of a Company procures an artificial and false value to be given to the shares in the Company which he professes to offer to the public. Generally, if a false and fraudulent statement is made with a view to deceive the party who is injured by it, that affords a ground of action. But I think that there must always be this evidence against the person to be charged, viz. that the plaintiff was one of the

persons to whom he contemplated that the representation should be made, or a person whom the defendant ought to have been aware he was injuring or might injure. If a director of a Company, one of the persons who puts the shares forth into the world, deliberately adopts a scheme of falsehood and fraud, the effect of which is that parties buy the shares in consequence of the falsehood, I should feel no difficulty in saying that in such case an action is maintainable.

1859.  
 ~~~~~  
 BEDFORD  
 v.  
 BAGSHAW.

Rule discharged.

CORNISH v. ABINGTON.

April 29.

**DEBT** for goods sold and delivered, work done and materials provided, and on accounts stated.

Pleas (inter alia).—Never indebted and payment.


Whereupon issues were joined.

At the trial, before *Martin*, B., at the sittings in London after last Michaelmas Term, it appeared that in 1856 the plaintiff, a lithographic printer, took into his employment one Gover to superintend the printing and take orders for printing, at a salary of 35s. a week, The defendant was a

If any person, by actual expressions or by a course of conduct, so conducts himself that another may reasonably infer the existence of an agreement or licence, and acts upon such inference, whether the former intends that he should

do so or not, the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct.

G., the foreman of the plaintiff, a lithographic printer, employed by him to get orders for printing, being desirous of publishing certain maps and other works for himself, agreed with the defendant, a publisher, to supply maps, &c., to him to be sold on commission. He then entered an order as from the defendant in the plaintiff's order book. Maps and other goods were supplied to the defendant from the plaintiff's premises, some of them accompanied by delivery notes requesting the defendant to receive the goods from the plaintiff. Receipts to the same effect were signed by the defendant. The plaintiff made out an account amounting to 108l., charging the defendant, and handed it to G., who shewed it to the defendant. The defendant accepted bills for a part of the amount of this account and gave the balance in cash to G., who handed the cash and bills to the plaintiff. Other goods being supplied, the plaintiff sent the invoice of them to the defendant charging him with the price. The defendant applied to G. for an explanation, and, on being told by G. that it was a mistake, took no steps to inform the plaintiff. The jury found that the defendant did not authorize G. to use his name in ordering the goods; but that from the manner in which the defendant had acted the plaintiff believed that he was selling the goods to the defendant.—*Held*, that the defendant was liable to the plaintiff for the price of the goods.

1859.  
  
 CORNISH  
 v.  
 ABINGTON.

publisher. The plaintiff stated that the first order on the defendant's account came from Gover. In September, 1857, the plaintiff made out an account against the defendant, charging him with 108*l.* for printing maps, and gave it to Gover, who handed the account to the defendant. Gover brought the plaintiff two bills, one for 30*l.* and the other for 40*l.*, and the balance in cash. The bills when produced appeared to be drawn by the plaintiff and accepted by the defendant: they were duly paid at maturity. Afterwards some more printing was done by the plaintiff, who also supplied the paper. Some of the goods were accompanied by delivery notes, as follows:—

“ Mr. Abington,

“ Please to receive 50 ‘ Coloured Panoramic View,’  
 300 ‘ Panoramic View.’

“ From William Cornish.”

Corresponding receipts were signed by the defendant. In other instances the delivery notes were from Gover. The plaintiff said that he did not supply the goods on the credit of Gover. Gover left the plaintiff's service in March 1858. About two months afterwards the plaintiff called on the defendant to ask him when it would be convenient to settle his paper account. The defendant said he knew nothing about it. The plaintiff asked if he had not received the paper and the account. The defendant said he had had no transactions with the plaintiff: he owed the money to Gover. He admitted that he had received the invoice of the paper, which amounted to 29*l.*, and produced it. This invoice charged the defendant as debtor to the plaintiff. The plaintiff said, “ I have received large sums of money from you.” The defendant said, “ I have received large sums of money for Gover, and handed the money to him.” Gover being re-called stated, that as the plaintiff would not allow him to publish himself, he told the defendant he was about to publish a Map of India, and that as the plaintiff

would not allow him to have it printed at his office it must be entered in the defendant's name, to which the defendant said he had no objection, and he accordingly took the order. Gover also said that he used to supply paper to the defendant and to produce to the defendant receipts from the plaintiff, shewing that he was paying ready money.

The defendant stated, that in 1856 and 1857 Gover had applied to him to publish various works and maps for himself, which the defendant agreed to on receiving the usual commission, and that he had paid over to Gover the proceeds of the sales only deducting the commission. That on receiving the invoice for the paper in January 1858, he asked Gover for an explanation. Gover said: "That fool Cornish has been making out invoices himself and has charged you instead of me. I will see him on the subject: he will at once see that it is an error, and you will hear no more about it." The defendant said that he was satisfied with this explanation, and he heard no more about it till the interview with the plaintiff above mentioned. The defendant said that Gover had no authority to pledge his credit to the plaintiff. It was not disputed that as between Gover and the defendant the account was settled.

The learned Judge suggested that a count in trover should be added. The defendant's counsel submitted that there was no evidence of a conversion. The learned Judge asked the jury; first, did the defendant authorize Gover to use his name in ordering the work to be done? The jury answered this question in the negative. Secondly: was the manner in which the defendant signed the receipts such as to induce the plaintiff to think that he was buying the goods on his own account? The jury found that it was. Upon which the learned Judge directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

1859.

CORNISH  
v.  
ABINGTON.

1859.  
 ~~~~~  
 CORNISH  
 v.  
 ABINGTON.

*Shée*, Serjt., in Hilary Term (Jan. 12), obtained a rule to enter a verdict for the defendant, on the ground that there was no evidence to support the plaintiff's claim, either on the record as it originally stood, or as amended by the Judge at the trial; that the Judge had no power to add the count in trover, or that such power should not have been exercised. Or, if the Court should think that the count in trover was properly added, why the plaintiff should not pay to the defendant such costs as the Court should think fit.

*Prentice* now shewed cause.—If Gover obtained the goods from the plaintiff by false pretences the property in them remains in the plaintiff, and he is entitled to recover in trover. But the plaintiff is entitled to a verdict on the declaration as it stood originally. Gover was a foreman in the employment of the plaintiff. The evidence shews that the defendant knew who he was. Gover entered orders in the order book which purport to be on account of the defendant. The defendant received the goods, and so conducted himself as to induce the plaintiff to believe that he was buying the goods on his own account. The case falls within the principle laid down in *Pickard v. Sears* (a) and *Gregg v. Wells* (b), that “where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter the existence of a different state of things as existing at the same time.” [*Bramwell*, B.—I am not sure that “wilfully,” in the rule referred to, means anything more than “voluntarily.”] To

(a) 6 A. & E. 469.

(b) 10 A. & E. 90. See also *Clarke v. Hart*, 7 H. L. 633.

say the least, the defendant acted very negligently, if not improperly. In *Freeman v. Cooke* (a) *Parke*, B., in delivering the judgment of the Court, pointed out that "if, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect." [*Pollock*, C. B.—Here the sending of the invoice charging the defendant says distinctly, "Sir, I am furnishing these goods on your account."] In *Kingsford v. Merry* (b) the delivery order was obtained by fraud. [*Bramwell*, B.—That case was not put by the defendant's counsel on the ground that the plaintiffs had in truth licensed the conduct of the defendant.]—The count in trover was properly added. [*Martin*, B.—The question is, whether the plaintiff ought not to pay all the costs of the trial. He gets the benefit of a fresh action in tort.] Assuming that trover is maintainable, the plaintiff is at liberty to waive the tort and sue for goods sold and delivered: *Foster v. Stewart* (c), *Smith v. Hodson* (d).

*J. J. Powell* (with whom was *Lush*), in support of the rule.—First, suppose Gover was the plaintiff's agent. The plaintiff has been paid: he received the bills of exchange through Gover, which shews that Gover was the authorized agent of the plaintiff to receive payments. The plea of payment was therefore proved, because it was shewn that,

(a) 2 Exch. 654.

(b) 1 H. &amp; N. 503.

(c) 3 M. &amp; Sel. 191.

(d) 4 T. R. 211; and see 2 Smith's Leading Cases, p. 100.

1859.

CORNISH  
v.  
ABINGTON.

1859.  
 CORNISH  
 v.  
 ABINGTON.

as between Gover and the defendant, the account was settled. [*Martin*, B.—To sustain the plea of payment, a payment to Gover *as agent* of the plaintiff must be shewn.] Secondly, suppose that Gover was dealing as principal. If the plaintiff chooses to come forward and say that he is an agent, he must take to the account subject to all rights against Gover: *George v. Clagett* (a). [*Bramwell*, B.—Gover had no right to receive payments for the plaintiff. What is there to shew that the plaintiff acted so as to hold out Gover as a person having such authority?] The defendant did not know that Gover was not the principal. [*Channell*, B.—I suppose you would say he was agent for all purposes, or agent for none; if he was agent for all purposes the rules as to undisclosed principals apply.] The plaintiff was not induced to supply the goods by the signing of the receipts.

POLLOCK, C. B.—At the trial the jury found that the defendant so conducted himself as to induce the plaintiff to believe that he was dealing with the defendant. Therefore the rule must be discharged. My brother *Martin* had some doubt whether any case had gone to the extent of deciding that a party might be liable where he had no intention of creating the erroneous impression, and gave the plaintiff liberty to amend by inserting a count in trover. But we are all of opinion that the plaintiff is entitled to recover, without having recourse to the count in trover, under the count for goods sold and delivered. The ground of my opinion is this:—The jury having found that the defendant, whether intentionally or not, led the plaintiff to form an opinion that he was dealing with the defendant, and induced him to furnish goods to the defendant, the defendant must pay him for them. No exception is taken

(a) 7 T. R. 359.

to the finding of the jury. In the course of the proceedings the plaintiff sent an invoice to the defendant, charging the defendant as debtor to him for the price of the goods. The defendant called on Gover for an explanation. Gover replied, "That fool Cornish has been making out invoices himself, and has charged you instead of me." The sending of the invoice was equivalent to notice that the defendant was not dealing with Gover, but with the plaintiff. If, after that, the defendant chose to accept the explanation of Gover, when he ought not to have been satisfied without communication with the plaintiff, he must take the consequences. Lord *Wensleydale*, in *Freeman v. Cooke* (a), commenting on the earlier case of *Pickard v. Sears* (b), pointed out a limitation of the application of the rule; viz. that "in most cases to which the doctrine in *Pickard v. Sears* is to be applied, the representation is such as to amount to the contract or licence of the party making it." No doubt, unless the representation amounts to an agreement or licence, or is understood by the party to whom it is made as amounting to that, the rule would not apply; but although the case of *Freeman v. Cooke* limited the application of the rule to this extent, the Court point out that the word "wilfully," in the rule as laid down in *Pickard v. Sears*, means nothing more than "voluntarily." Lord *Wensleydale*, perceiving that the word "wilfully" might be read as opposed not merely to "involuntarily" but to "unintentionally," shewed that if the representation was made voluntarily, though the effect on the mind of the hearer was produced unintentionally, the same result would follow. If a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning,

1859.  
  
 CORNISH  
 v.  
 ABINGTON.

(a) 2 Exch. 654.


(b) 6 A. &amp; E. 469.

1859.  
—  
CORNISH  
v.  
ABINGTON.

he cannot afterwards say he is not bound if another, so understanding it, has acted upon it. If any person, by a course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or licence, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct. In the present case the plaintiff had distinctly given notice that he understood that the defendant was dealing with him. The defendant gave no answer. He ought to have sent back the invoice.

BRAMWELL, B.—The question is whether the verdict was satisfactory. I think it was quite right. It is a strong fact that the plaintiff for a long time supposed himself to be dealing with the defendant. When this was brought to the attention of the defendant he was content to take the word of the servant who was defrauding his master. Taking the finding of the jury, that the plaintiff supposed that he was dealing with the defendant, and that the defendant's conduct was such as reasonably to induce that belief, then the rule referred to by the Lord Chief Baron applies. The rule is, that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists and acts on that inference, he shall be afterwards estopped from denying it. That being so, there was a *primâ facie* case against the defendant. I am inclined to agree with Mr. *Powell* that the estoppel applies to the entire transaction. But the case is not in the dilemma presented by him, that Gover had either a general authority or none at all. He may have had a partial authority. Mr. *Powell* says that he had received both bills and money for

the plaintiff in settlement of the former account. Now, if the defendant had handed the price of the goods in money to Gover the case might have been different; but he settled the amount in account with him; and there is no ground for saying that Gover had authority to do that, or that the plaintiff so conducted himself as to induce the defendant to believe that he had. As to the last count, I think that if any costs have been occasioned by the amendment the defendant ought to have them.

1859.  
  
 CORNISH  
 v.  
 ABINGTON.

CHANNELL, B.—I am of the same opinion. My brother *Martin* is satisfied, and I agree with him in thinking the finding of the jury right. Applying the doctrine enunciated in *Freeman v. Cooke* to the facts of the present case, there was clearly evidence to support the count for goods sold and delivered. Then, taking the defendant to be the purchaser of the goods, has he discharged himself? I think not. Where payment to an agent is relied upon as payment to a principal, the authority of the agent to receive payment must be shewn. Here there was none in point of fact. If any is to be presumed it must be gathered from what was done by the plaintiff as a recognition of Gover's authority. I do not say that, if there had been a payment to Gover in money or by bills, there would have been no evidence against the plaintiff of his authority to receive payment in that way. But there was nothing but a settlement in account between Gover and the defendant. It is unnecessary to consider the count in trover. It appears to me that the addition of that count occasioned no expense to the defendant, and is no ground for the allowance of any costs. It occasioned no additional expense at the trial, nor has it caused any here to-day.

MARTIN, B.—There is no reason to suppose that the

1859.  
—  
CORNISH  
v.  
ABINGTON.

defendant acted otherwise than as an honest man, and the case is somewhat hard upon him. We ought, when he is called upon to pay a second time, to see that he is clearly liable. No reflection can be cast on the plaintiff's conduct; there was no negligence or misconduct of any sort on his part. Gover was taken into the plaintiff's employ in 1857. He dealt with Abington, and entered the transactions in Cornish's books as between Cornish and Abington. Cornish was paid by two bills drawn by him and accepted by Abington. It was communicated to Abington that he was treated as the buyer of the goods. He takes no notice, except by communicating with Gover. Abington went on dealing with Gover, knowing that he was Cornish's foreman, and dealing with him as if he were a principal, receiving from time to time articles in which his master dealt. The goods were accompanied by delivery notes from Cornish which were signed by Abington. It was said that coming from a printer or publisher the delivery notes could not be treated as shewing who was the vendor. But witnesses said it would be quite irregular if the notes did not shew from whom the goods really came as owner. In other cases the party estopped has intended to produce the false impression. Here, however, I believe that the defendant did not intend to produce any false impression on the mind of the plaintiff. Then it was said that the goods were paid for. But the defendant never paid or intended to pay this debt, of which he was ignorant.

Rule discharged.



## EASTER VACATION, 22 VICT.

## IN THE EXCHEQUER CHAMBER.

*(Appeal from the Court of Exchequer.)*

WILLIAMS v. SMITH.

1859.

May 17.

THIS was an appeal from the judgment of the Court of Exchequer, making absolute a rule to enter the verdict for the defendant pursuant to leave reserved at the trial. (Reported 2 H. & N. 443). The case stated on appeal was (so far as material) as follows:—

This was an interpleader issue, to try whether thirteen steers were, on the 9th day of December, 1856, the property of plaintiff, as against the defendant, an execution creditor of one Daniel Selwyn. The issue was tried at the Spring Assizes, 1857, for the county of Gloucester, before *Willes, J.*

Upon the trial it was proved that a writ of *fi. fa.*, at the suit of the defendant against the said Daniel Selwyn, issued on the 24th day of April, 1856, for an amount greater than the value of the steers, viz. for 99*l.* 19*s.* 6*d.* On the 9th day of May, 1856, a levy was made on the goods of the said Daniel Selwyn under the said writ and the sum of 2*l.* 10*s.* was realized thereunder; and the said writ remained in the hands of the sheriff of Gloucestershire unexecuted and unsatisfied (save as aforesaid) until the seizure by him of the steers as hereinafter mentioned. In the month of June, 1856, the said Daniel Selwyn purchased the steers, the subject of the said issue, and had such steers in the

Held in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that the 1st section of "The Mercantile Law Amendment Act, 1856," does not apply to cases where the writ of execution has been delivered to the sheriff before that Act passed.

1859.  
—  
WILLIAMS  
v.  
SMITH.


county of Gloucester within the bailiwick of the said sheriff of Gloucestershire, and liable to seizure under the said writ of fi. fa., in the said month of June 1856. On the 26th day of August following the steers were bought by the plaintiff from the said Daniel Selwyn, not in market overt but within the said sheriff's bailiwick. On the 9th day of December, 1856, the steers were seized by the sheriff of Gloucestershire, within his bailiwick, under the said writ of fi. fa. at the suit of John Smith, the above named defendant, as and for the goods of the said Daniel Selwyn. On the part of the plaintiff evidence was given that he purchased the cattle for a valuable consideration and bonâ fide.

The learned Judge left the question to the jury, who found that the sale was bonâ fide, and thereupon his lordship directed a verdict for the plaintiff, reserving leave to the defendant to move to enter the verdict for him, on the ground that, the writ of fi. fa. having been delivered to the sheriff previously to the passing of the 19 & 20 Vict. c. 97, the first section of that statute did not apply to the present case.

*Pigott*, Serjt., (*H. James* with him), for the plaintiff.—The writ of fi. fa. not having been executed at the time the 19 & 20 Vict. c. 97 passed, the plaintiff's title to the goods is rendered valid by the first section of that Act. The object of the legislature was to remedy the inconvenience of a bonâ fide purchase being defeated by the previous delivery of a writ of fi. fa. to the sheriff. At common law a fi. fa. had relation to its teste, and bound the goods from that time. This relation being productive of great mischief to purchasers, the 29 Car. 2, c. 3, s. 16, enacted, that a writ of execution should only bind the goods from the time of its delivery to the sheriff. That in some measure

remedied the mischief, but the object of the 19 & 20 Vict. c. 97, s. 1, was to put an end to all inquiry as to when the writ was delivered to the sheriff. Unless that statute be construed as applicable to cases where the writ has been delivered to the sheriff before it passed, great inconvenience will arise from the 124th section of the Common Law Procedure Act, 1852, which allows writs of execution to be renewed from year to year until executed. It is clear that the attention of the legislature was directed to the time when the several provisions of the Act should take effect, for the 3rd section uses the words, "no special promise to be made by any person *after the passing of this Act*," &c. The 6th section enacts, "that no acceptance of any bill of exchange, whether inland or foreign, made after the 31st of December, 1856," &c. Again, the 9th section, with respect to the limitation of actions for merchants' accounts, uses the words "after the passing of this Act." [*Crowder, J.*—When does the 4th section come into operation?] It is prospective only. [*Williams, J.*—The difficulty here is that the writ had bound the goods before the statute passed; and the rule is, that statutes must not be construed so as to defeat vested rights.] The construction contended for does not give a retrospective operation to the Act. The plaintiff acquired a title to the goods, subject to its being prejudiced by the writ in the hands of the sheriff. The Act says that the title shall not be affected by that circumstance. The words, "no writ of fi. fa. shall prejudice the title to goods," mean in effect that no bonâ fide purchaser need search the sheriff's office for a writ. A fieri facias only bound the goods as against the debtor and those claiming under him: it might be defeated by a sale in market overt, by the execution of a subsequent writ, by bankruptcy, or the removal of the goods from the county: *Payne v. Drewe* (a).

(a) 4 East, 523.

1859.  
  
 WILLIAMS  
 v.  
 SMITH.

1859.  
 WILLIAMS  
 v.  
 SMITH.

county of Gloucester within the borough  
 of Gloucestershire, and liable to the  
 writ of fi. fa., in the said writ  
 26th day of August following, the  
 plaintiff from the said writ  
 overt but within the said writ  
 day of December following, the  
 sheriff of Gloucestershire, in  
 said writ of fieri facias, in  
 named defendant.

Selwyn.

construed the 14th section as  
 that having no operation. [*Willes, J.*—That inter-  
 and was overruled in *Jackson v. Woolley (c)*.] There  
 are instances in which a retrospective effect has been  
 given to new statutes: *Towler v. Chatterton (f)*, *Freeman*  
*v. Moyes (g)*.

*Macnamara* appeared for the defendant, but was not  
 called upon to argue.

ERLE, J.—I am of opinion that the judgment of the  
 Court below ought to be affirmed. The 1st section of the  
 19 & 20 Vict. c. 97 has no retrospective effect in respect of  
 writs delivered to the sheriff before that Act passed. The  
 words of the section are, “that no writ of fieri facias or  
 other writ of execution, and no writ of attachment against  
 the goods of a debtor, shall prejudice the title to such  
 goods acquired by any person bonâ fide and for a valuable  
 consideration before the actual seizure or attachment thereof  
 by virtue of such writ, provided such person had not, at the

- (a) 1 Cl. & F. 438. 474.
- (b) 10 M. & W. 42. 47.
- (c) 8 E. & B. 784.
- (d) 8 E. & B. 429.

- (e) 3 Drew. 628.
- (f) 6 Bing. 258.
- (g) 1 Adol. & E. 338.

1859.  
 WILLIAMS  
 v.  
 SMITH.

such title, notice that such writ, or any  
 of which the goods of such owner  
 attached, had been delivered and re-  
 hands of the sheriff, undersheriff  
 tained some doubt, because I  
 he statute was to validate all  
 sing; and if the language  
 be valid, notwithstanding  
 delivered to the sheriff,"  
 tion that purchases would be  
 ne writ was delivered to the sheriff  
 at passed. But the words of the statute are,  
 "writ shall prejudice the title to such goods;" and,  
 according to the general rule of construction laid down in  
*Moon v. Durden* (a), a statute is not to have a retrospective  
 operation unless the intention is clear and express. We  
 gave great consideration to this subject in the Court of  
 Queen's Bench, because Vice Chancellor *Kindersley*, in  
*Thompson v. Waithman* (b), gave to the 14th section a  
 retrospective effect, and in deference to a Court of co-  
 ordinate jurisdiction the judgment of the Court of Queen's  
 Bench in *Jackson v. Woolley* was in accordance with that  
 view; but all the Judges were of the opinion which was  
 afterwards affirmed in the Court of Error. We are bound  
 by the decision of that Court in *Jackson v. Woolley*, and  
 consequently the judgment of the Court of Exchequer in  
 this case must be affirmed.

WILLIAMS, J.—I am of the same opinion. The fi. fa.  
 had begun to operate before the statute passed, and was in  
 full vigour at that time. We cannot give the statute a  
 retrospective effect, so as to deprive the defendant of any  
 right he possessed under his writ.

(a) 2 Exch. 22.

(b) 3 Drew. 628.

20 Vict.  
 1859.  
 Williams  
 v.  
 Smith

1859.  
 WILLIAMS  
 v.  
 SMITH.

The property in the goods was not altered by the delivery of the writ to the sheriff: Per *Littledale*, J., in *Lucas v. Nockells* (a); and the only meaning of the goods being bound was, that notwithstanding a sale of them afterwards no property passed to the purchaser: Per *Parke*, B., in *Harding v. Hall* (b). [*Williams*, J., referred to *Jackson v. Woolley* (c).] The 10th section has been held to apply to cases where the cause of action accrued before the Act came into operation and the action is commenced after that time: *Cornill v. Hudson* (d). In *Thompson v. Waithman* (e), *Kindersley*, V. C., construed the 14th section as having a retrospective operation. [*Willes*, J.—That interpretation was overruled in *Jackson v. Woolley* (c).] There are other instances in which a retrospective effect has been given to new statutes: *Towler v. Chatterton* (f), *Freeman v. Moyes* (g).

*Macnamara* appeared for the defendant, but was not called upon to argue.

ERLE, J.—I am of opinion that the judgment of the Court below ought to be affirmed. The 1st section of the 19 & 20 Vict. c. 97 has no retrospective effect in respect of writs delivered to the sheriff before that Act passed. The words of the section are, “that no writ of fieri facias or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person bonâ fide and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ, provided such person had not, at the

(a) 1 Cl. & F. 438. 474.  
 (b) 10 M. & W. 42. 47.  
 (c) 8 E. & B. 784.  
 (d) 8 E. & B. 429.

(e) 3 Drew. 628.  
 (f) 6 Bing. 258.  
 (g) 1 Adol. & E. 333.

time he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered and remained unexecuted in the hands of the sheriff, undersheriff or coroner." I have entertained some doubt, because I thought that the intention of the statute was to validate all purchases from the time of its passing; and if the language had been, "that all purchases shall be valid, notwithstanding a writ of fieri facias has been delivered to the sheriff," I should have been of opinion that purchases would be validated although the writ was delivered to the sheriff before the Act passed. But the words of the statute are, "no writ shall prejudice the title to such goods;" and, according to the general rule of construction laid down in *Moon v. Durden* (a), a statute is not to have a retrospective operation unless the intention is clear and express. We gave great consideration to this subject in the Court of Queen's Bench, because Vice Chancellor *Kindersley*, in *Thompson v. Waithman* (b), gave to the 14th section a retrospective effect, and in deference to a Court of co-ordinate jurisdiction the judgment of the Court of Queen's Bench in *Jackson v. Woolley* was in accordance with that view; but all the Judges were of the opinion which was afterwards affirmed in the Court of Error. We are bound by the decision of that Court in *Jackson v. Woolley*, and consequently the judgment of the Court of Exchequer in this case must be affirmed.

WILLIAMS, J.—I am of the same opinion. The fi. fa. had begun to operate before the statute passed, and was in full vigour at that time. We cannot give the statute a retrospective effect, so as to deprive the defendant of any right he possessed under his writ.

(a) 2 Exch. 22.

(b) 3 Drew. 628.

1859.  
WILLIAMS  
v.  
SMITH.

CROMPTON, J.—I am of the same opinion. In *Jackson v. Woolley* the Court of Queen's Bench were unanimous in giving the Act the construction afterwards put upon it in the Court of Error; but they thought that, out of deference to the Vice Chancellor, they ought to give judgment in accordance with his view.

CROWDER, J.—I think that the principle acted on in *Jackson v. Woolley* with respect to the 14th section is equally applicable to the 1st section. I entirely agree with the language of *Rolfe, B.*, in *Moon v. Durden* (a), where, referring to the general rule stated by Lord *Coke* (b), “*Nova constitutio futuris formam imponere debet, non præteritis*,” he says, “and the principle is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively.” Here, so far from that being the case, it seems to me, from the very language of the 1st section, that it was meant to operate prospectively only.

WILLES, J., and HILL, J., concurred.

Judgment affirmed.

(a) 2 Exch. 22, 33.

(b) 2 Inst. 292.



1859.

## IN THE EXCHEQUER CHAMBER.

*(Appeal from the Court of Exchequer.)*

PHILLIPS v. NAYLOR and Others.

May 17.

**T**HIS was an appeal against the judgment of the Court of Exchequer making absolute a rule to enter the verdict for the defendants, pursuant to leave reserved at the trial. The pleadings and facts fully appear in the report of the case in the Court below (3 H. & N. 14).

*D. D. Keane*, for the plaintiff (a).—There was evidence of malice. The power given by the 12 & 13 Vict. c. 14 to parish officers to enforce payment of poor rates was meant to be exercised against contumacious persons, who, being able, refuse to pay their rates. It is in the discretion of parish officers whether they will enforce payment of a rate, and if they decline to do so, no indictment will lie against

On the 24th January, 1857, the plaintiff was adjudicated bankrupt. At that time he owed two poor-rates, and on the 31st January he was assessed to a third rate. On the 5th February he obtained a protection, under the 112th section of The Bankrupt Law Consolidation Act, 1849, until the 5th March, which protection was

extended to the 7th April. On the 5th March all his goods were sold. In February, the rates were demanded of him by one of the defendants, who was assistant overseer, and a notice was left for payment in ten days, or legal proceedings would be taken to enforce them. On the 13th February the same defendant applied to the justices and obtained a summons in the usual form, requiring the plaintiff to appear before them for the non-payment of the rates. The plaintiff wrote upon the summons that his goods were under the protection of the Court of Bankruptcy, and the rates would be paid out of the estate, and left it at the defendant's house. The plaintiff did not appear before the justices, and they granted the usual distress warrant. This was returned nulla bona, and on the 16th March a warrant was issued by the justices commanding another of the defendants, a constable, to arrest the plaintiff and keep him in gaol for one month, unless the rates were sooner paid. On the 16th March the constable arrested him, when he produced his protection and was released. On the 23rd March he was again arrested, and kept in custody until the 7th of April, when he was discharged by order of a Commissioner of Bankruptcy.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that there was no want of reasonable and probable cause for the arrest and no evidence of malice.

(a) Before *Erle, J., Williams, J., Crowder, J., Crompton, J., Willes, J., and Hill, J.*

1859.  
 PHILLIPS  
 v.  
 NAYLOR.

them. Here the defendants, with full knowledge of all the facts, caused the plaintiff to be imprisoned. There was no object to be attained by the imprisonment except some purpose of their own. There was also a want of reasonable and probable cause. *Hope v. Fenner* (a) shews that, in considering whether or not there is want of reasonable and probable cause, regard must be had to the surrounding circumstances and to the law, and not merely to what was operating on the mind of the party. The 112th section of The Bankrupt Law Consolidation Act, 1849, is interposed between the act of the magistrates in granting the warrant of commitment and the act of the defendants in putting it in force. The section does not prohibit the issuing of a warrant, but only an arrest under it. The warrant was in the nature of civil process, and the defendants should have abstained from executing it. It was no more mandatory than an order for the removal of a pauper, as to which the overseers have a discretion. The 112th section relates to arrest by a creditor, the 113th to arrest by an officer. The creditor is prohibited from arresting; the officer may arrest, but he is bound to discharge on production of the bankrupt's protection. *Lloyd v. Heathcote* (b) and *Ex parte The Churchwardens and Overseers of the Parish of Burwash* (c) are authorities that the overseers are creditors in respect of a poor rate, and may prove it under a commission in bankruptcy. It is alleged that at all events the plaintiff was liable to be arrested for the rate which became due after his bankruptcy, and the case of *Grace v. Bishop* (d) is relied on. Reference was there made to *Darley v. Baugham* (e), where it was held that a bankrupt could not be arrested on a bill of exchange, which became due after his bankruptcy

(a) 2 C. B. N. S. 387.

(b) 2 Brod. & B. 368.

(c) 1 L. M. & P. 60.

(d) 11 Exch. 424.

(e) 5 T. R. 209.

during the time allowed him, by the 5 Geo. 2, c. 30, s. 5, for attending the Commissioner to be examined; and the Court seemed to have considered that in that case the debt was proveable under the commission, whereas the power to prove such a debt was first given by the 49 Geo. 3, c. 126, s. 9. It is true that in this case the debt arises from the obligation which the law casts on the parish officers of making a rate; but the 164th section of The Bankrupt Law Consolidation Act, 1849, enables "every creditor of the bankrupt" to prove under the fiat whether his debt arises from contract or is created by operation of law. It is sufficient that the debt is demandable at the time of proof.—He also referred to the 17 Geo. 2, c. 3, s. 1, and 17 Geo. 2, c. 38, s. 12.

1859.  
PHILLIPS  
v.  
NAYLOR.

*Couch* appeared for the defendants, but was not called upon to argue.

ERLE, J.—We are all of opinion that the judgment of the Court below ought to be affirmed. The inquiry to which our attention has been directed is more to the due appreciation of the evidence than as to laying down any principle of law. The action is brought by the plaintiff, from whom three poor-rates were due, against the parish officers for what they did in endeavouring to enforce payment of the rates; and, unless they acted maliciously and without reasonable and probable cause, the first count cannot be supported. I cannot find any evidence of malice, or that the defendants acted from a corrupt motive, and the plaintiff could only succeed if he proved an absence of reasonable and probable cause, which would be some evidence of acting maliciously. The rates were due from the plaintiff, and the parish officers only applied to the proper tribunal of the county, the magistrates, to exercise the

1859.  
PHILLIPS  
v.  
NAYLOR.

power of the law in enforcing payment. It should be observed that parish officers are different from ordinary creditors, who try to obtain payment of a debt for the benefit of themselves. Parish officers seek no benefit to themselves but act in discharge of their duty to the rate-payers, who would suffer in case of their neglect. The defendants go to the magistrates, who order the plaintiff to be summoned to shew cause why he does not pay the rates. The plaintiff chooses to take no notice of the summons, but leaves the magistrates to enforce payment by due course of law. The magistrates issue a distress warrant, which is returned nulla bona; and then, as authorized by statute, they issue a warrant to take the body of the plaintiff; and that is placed in the hands of the defendants. So far it is impossible to maintain that the defendants acted without reasonable and probable cause, since they acted in discharge of their duty and under the sanction of the magistrates. Then can it be said that they acted without reasonable and probable cause in enforcing the warrant? It is contended that the sum due for the rates was a debt, and that parish officers, like other creditors, ought to prove under the bankruptcy. We abstain from giving any judgment on that point, because it is not necessary for the decision of the case, the question being whether the defendants acted without reasonable and probable cause. It is contended that they have, because it is assumed that they knew that a poor-rate is proveable under a bankruptcy, and therefore that the 12 & 13 Vict. c. 106, ss. 112, 113, gave protection to a person declared bankrupt; but, having heard the argument of the plaintiff's counsel, we think that the parish officers cannot be said to have acted without reasonable and probable cause because they had not formed a clear opinion upon a matter which an astute lawyer took considerable time to enforce upon the Court. On the

whole, therefore, we are of opinion that there was no evidence of a want of reasonable and probable cause, and no evidence of malice, and the judgment of the Court below must be affirmed. I might say that there are other objections to this action, but it is sufficient to state the grounds I have mentioned.

1859.  
 PHILLIPS  
 v.  
 NAYLOR.

Judgment affirmed.

## IN THE EXCHEQUER CHAMBER.

*(Error from the Court of Exchequer.)*

HENDERSON v. ELIZABETH BROOMHEAD.

May 18.

**E**RROR on a bill of exceptions.—The declaration stated, that the defendant falsely and maliciously composed and wrote and published of and concerning the plaintiff, in relation to his calling as an attorney's clerk, and in relation to his conduct while he was clerk to one Henry Broomhead, who was the husband of the defendant, in a paper purporting to be an affidavit by the defendant in an action wherein Ellen Winter, executrix of the last will and testament of the said Henry Broomhead, was plaintiff and the defendant in this action was the defendant, in the words and figures following:—"I, Elizabeth Broomhead, &c., make oath and say: 1. That the exhibit marked A is a copy of the writ of summons in this action, and that there are no particulars of the goods and chattels indorsed therein. 2. That this action is brought by the plaintiff (meaning the said Ellen Winter), as executrix of my late husband Henry Broomhead, to recover goods, household furniture, &c., as alleged in the declaration in this cause. 3. That I have never been

No action lies against a party who, in the course of a cause, makes an affidavit in support of a summons taken out in such cause, which is scandalous, false and malicious, though the person scandalized, and who complains, is not a party to the cause.

1859.

HENDERSON  
v.  
BROOMHEAD.

served with any demand or particulars of the goods for which this action is brought. 4. That my said husband cohabited with the said Ellen Winter for a long time prior to his death at Sandon Place, during which time I resided with my daughter, E. M. Ward, apart from my husband. 5. That my husband, a few weeks before his death, turned the plaintiff (meaning the said Ellen Winter) out of the house at Sandon Place, and at the repeated and urgent solicitations of my husband, who was then on his death bed and was desirous of becoming reconciled to me and to his children, I removed with my said children to the house in Sandon Place, and remained with my husband till his death which took place on the 28th of July last. 6. That my husband being in a dying state repeatedly, in the presence of myself and children, requested his clerk, Thomas Henderson (meaning the plaintiff), to go down to his office and destroy the will he had made in favour of the said plaintiff (meaning the said Ellen Winter), and to make another in favour of his family, &c. 7. That the draft of such will was subsequently found to be in the handwriting of Thomas Henderson (meaning the plaintiff). 8. That the said T. Henderson made several pretences for not destroying the said will, and delayed the making of the fresh will. 9. That at the request of my said husband, who doubted the integrity of the said T. Henderson, I sent a telegram to my son, Henry Broomhead, to come to Sheffield and receive his father's last instructions, but my husband expired before he arrived. 10. That the said plaintiff (meaning the said Ellen Winter) has resided with the said T. Henderson (meaning the plaintiff) since my husband's death, &c. 11. That when I left the house in Sandon Place, I took away what furniture I was advised I was entitled to remove, and no more. 12. That I do not know for what specific goods and chattels the plaintiff is proceeding, and I am

advised that I cannot safely proceed with my defence till such particulars are given. 13. That I am advised and believe that I have a good defence to this action on the merits." The defendant thereby, amongst other things, intending and meaning that the said Henry Broomhead had requested the plaintiff to destroy the said will of the said Henry Broomhead to the end that the same might be thereby cancelled, and that the plaintiff had purposely and fraudulently and dishonestly, and with a view of preventing the said will from being cancelled, and with a view of thereby benefiting the said Ellen Winter, and of prejudicing the defendant and her family, contrary to the wish and intention of the said Henry Broomhead, delayed to destroy the said will of the said Henry Broomhead in his lifetime, and delayed to prepare for the said Henry Broomhead in his lifetime another will, in favour of the defendant's family, in order that the said Henry Broomhead might execute the same in due form of law, and so devise and bequeath his property to the defendant's family instead of to the said Ellen Winter; and that the plaintiff had made false, fraudulent and dishonest pretences to the said Henry Broomhead for not destroying his will; and that the said Henry Broomhead doubted the integrity of the plaintiff, &c.; whereby, &c.

Pleas.—First: Not guilty. Secondly: That the alleged libel is true.

Whereupon issues were joined.

Afterwards, on the 11th day of August, 1858, at Liverpool, before Sir Samuel Martin, Knight, &c., came the parties, &c.; and the jury, &c., as to the first issue within joined, say that the defendant is not guilty, and thereupon the jury were discharged from giving any verdict as to the second issue. The plaintiff assigned error upon the record

1859.

HENDERSON  
v.  
BROOMHEAD.

1859.  
  
 HENDERSON  
 v.  
 BROOMHEAD.

and bill of exceptions. The defendant alleged that there was no error therein.

The bill of exceptions stated that, to maintain the issue above joined, the plaintiff proved that, at the times in the declaration mentioned, he was an attorney's clerk, and that one Henry Broomhead formerly was an attorney and practised at Sheffield: that the plaintiff, for a long time before and at the death of Henry Broomhead, was the confidential clerk of Henry Broomhead: that the said Henry Broomhead died on the 28th of July, 1857, having first duly made his will, whereby he appointed Ellen Winter executrix, and that the defendant was the widow of Henry Broomhead; but that she had lived separate and apart from him for many years before his death: that on the 31st of July, 1857, the defendant caused a caveat to be entered in the proper Court against probate of the said will being granted to Ellen Winter: that on the 31st of December, 1857, an agreement was entered into between W. Unwin, acting as solicitor for the defendant and by her authority, and H. Anderson, acting as solicitor for Ellen Winter and by her authority, as follows:—

“Mem. 31 Dec. 1857.

“*Re Broomhead*, deceased.—In order to end all disputes, &c., between the executrix Ellen Winter and the next of kin of Henry Broomhead, deceased, it is agreed (*inter alia*) that the will shall be proved in solemn form: that the next of kin shall offer no opposition: that Ellen Winter shall pay to Mrs. Broomhead 700*l*.

Signed “W. Unwin.

“Henry Anderson.”

That before the signing of such agreement, on the 16th of September, 1857, Ellen Winter, as executrix of Henry Broomhead, had commenced the action in the declaration

mentioned, and on the 21st of June, 1858, declared in the said action against the defendant in trover and detinue for the goods of the plaintiff as executrix. That on the 25th of June, the defendant caused to be issued out of the Court a summons for particulars of the goods and chattels claimed in the declaration. In support of the summons, the defendant swore and signed the affidavit set out in the declaration, and afterwards the same was delivered to the attorney for the purpose of being used, and the same was used by the defendant's attorney in support of the said summons. That the summons was heard before *Bramwell*, B., when the attorney for the defendant, as her agent, produced and read aloud the said affidavit. On reading the affidavit, and hearing the attornies on both sides, *Bramwell*, B., made an order that particulars of the goods for which the action was brought should be delivered to the defendant. The plaintiff acted as clerk to the plaintiff's attorney in the action of *Winter v. Broomhead*, and had the management thereof.

The plaintiff, for the purpose of establishing his cause of action, and to entitle himself to the verdict of the jury on the issue first joined between the parties, offered to give evidence that the matters contained in the alleged libel, so far as they related to himself, were false, and that at the time of the composing of the alleged libel, and from thence to the time of the same being read and used as aforesaid, the defendant well knew the same were false. Whereupon the said Justice refused to receive such evidence for the purpose above mentioned, and directed the jury that it was not admissible for that purpose, although it would be admissible for the purpose of enhancing the damages in the event of the plaintiff having a lawful cause of action against the defendant; and the said Justice directed the jury that the composing and publishing the said alleged libellous matter

1859.

HENDERSON  
v.  
BROOMHEAD.

1859.  
 HENDERSON  
 v.  
 BROOMHEAD.

in manner aforesaid was not a legal subject-matter of this action. Whereupon the counsel for the plaintiff made his exception, &c.

*T. Jones* (with whom was *S. Temple*) argued for the plaintiff (a).—The evidence was admissible. The object of it was to shew that the defendant was actuated by express malice, and that the matter of the libel was utterly false—a mere invention of the defendant, without any sort of foundation. It is not disputed that, as regards the parties to a suit, neither can maintain an action against the other in respect of a false allegation in a proceeding had between them. In such cases the rule that an action shall not grow out of an action applies. But there is no case which decides that an action will not lie, though the libel is made in the course of a judicial proceeding, where the party complaining is a stranger, when there is malice in fact, an indirect motive on the part of the libeller, and the libel is wholly irrelevant. In the present case the summons was for particulars. In support of that summons the defendant made an affidavit that the now plaintiff had behaved himself in a treacherous way. That was not material to the question whether the defendant in the action of *Winter v. Broomhead* was entitled to particulars. *Bromage v. Prosser* (b) shews that where the publication of the libellous matter is *prima facie* excusable, evidence of ill-will and malice in fact may be given. The existence or non-existence of such malice in fact is the basis of the distinction between privileged and unprivileged communications. There is neither necessity nor any ground of convenience for holding that a party to an action may, in the course of such action, publish slanders on third persons with impunity. In *Hodgson v.*

(a) Before *Erle, J., Williams,* and *Willes, J.*  
*J., Crompton, J., Crowder, J.,* (b) 4 B. & C. 247.

*Scarlett* (a) it was held that an action does not lie against a barrister for words spoken by him as counsel in a cause, pertinent to the matter at issue. It was not argued that the words, being used in the course of a judicial proceeding, were privileged. Had that been the case, the inquiry as to their relevancy would have been out of place. An affidavit, or a speech by a party to the cause stands on the same footing as a speech by counsel. In *Buckley v. Wood* (b) it was resolved that for words not examinable in the Court in which they are published an action lies, for that cannot be in a course of justice; and the reason is given, "for the Court has no power or jurisdiction to do that which appertains to justice, nor to punish the said offences; and if such matters may be inserted in bills exhibited in so high and honourable a Court (c), in great slander of the parties, and they cannot answer it to clear themselves, nor have their actions as well to clear themselves of the crimes as to recover damages for the great injury and wrong done to them, great inconvenience will ensue; but the said libel, without any remedy given the party, will remain always on record, to his shame and infamy, which will be full of great inconvenience." The privilege of defaming another in the course of a cause does not extend beyond the necessity of the case. [*Crompton*, J.—It must not be assumed that the matters contained in this affidavit are irrelevant. *Williams*, J., referred to *Lake v. King* (d), and the note to that case.] In *Lake v. King* the distinction between cases where there is malice in fact and an indirect object, and cases where there is merely malice in law, is not adverted to. *Holroyd*, J., in *Hodgson v. Scarlett* (a), said, if words spoken in a course of justice "be fair comments on the evidence, and be relevant to the matter in

1859.

HENDERSON  
v.  
BROOMHEAD.

(a) 1 B. &amp; Ald. 232.

(b) 4 Rep. 14 b.

(c) The Star Chamber.

(d) 1 Wms. Saund. 131 b, and  
note 1, ib.

1859.  
 HENDERSON  
 v.  
 BROOMHEAD.

issue, then, *unless express malice be shewn*, the occasion justifies them. If, however, it be proved that they were not spoken *bonâ fide*, or express malice be shewn, then they may be actionable." In *Revis v. Smith* (a), which was an action brought in conformity with a suggestion in the note to *Hodgson v. Scarlett* (b), for making the imputation falsely and without reasonable or probable cause, there was no averment that the defendant acted *malâ fide*, or that he knew the imputation to be untrue; and several of the Judges advert to this in their judgments. In *Astley v. Young* (c) there was no question as to express or direct malice. In *Boulton v. Clapham* (d) the words spoken were a charge by one party against the other. All proceedings in Courts of justice may be freely published everywhere. If it were allowable for any person to utter in Court slanderous matters irrelevant to the questions before the Court, for which he could not be indicted for perjury, a person might publish any slander he pleased, ensuring to it the widest circulation, with entire impunity. [*Erle, J.*—Lord *Mansfield* meets the difficulty alluded to by saying that "the Court before whom the indignity is committed by *immaterial* scandal may order satisfaction, and expunge it out of the record, if it be upon record (e)."]

*Manisty*, for the defendant, was not called upon to argue.

ERLE, J.—The Court is of opinion that the judgment of the Court below must be affirmed. The question is, whether an action will lie against a party who in the course of a cause made an affidavit which contained matter scandalous to the present plaintiff, and which was false and

(a) 18 C. B. 126.

(b) 1 B. & Ald. 232. 245.

(c) 2 Burr. 807.

(d) Sir W. Jones, 431.

(e) 2 Burr. 810.

malicious. That is the full extent to which the allegations can be made out. I do not assent to the proposition that the matters which form the subject of this charge were irrelevant. I can easily see how they might be relevant. Upon the record there is a clear charge of perjury in the course of an action. I assume the charge to be true. The question then is, whether, instead of prosecuting the person who made the affidavit, for perjury, the party aggrieved has a right to bring a civil action. An action will not lie for defamatory words spoken in the course of litigation which are relevant to that litigation. The authorities are collected in the note to *Lake v. King*, 1 Wms. Saund. 131 b., note 1, and the general rule is there stated: "No false or scandalous matter contained in articles of the peace exhibited to justices of the peace, or in any other proceeding in a regular course of justice, will make it libellous." Several authorities are cited; they extend over many centuries down to the time when the learned annotator collected them. In *Astley v. Young* (a), where such an action was brought in the Court of King's Bench in Lord *Mansfield's* time, that learned Judge endeavoured to stop the counsel by saying, "Shew that a matter given in evidence in a Court of justice may be prosecuted in a civil action as a libel. The Court, indeed, before which such evidence is given may censure it." The party may be punished, and the abuse repressed by a prosecution for perjury, the result of which is to make the defendant infamous if he is convicted. It is said that the civil remedy should be allowed for the purpose of indemnifying the party injured. But the balance of inconvenience is strong against such an action. Witnesses would be subjected to peril. A party might be allowed, by his own single testimony against the oath of the witness, to obtain a verdict and get large

(a) 2 Burr. 810.

1859.  
 HENDERSON  
 v.  
 BROOMHEAD.

1859.  
HENDERSON  
v.  
BROOMHEAD.

damages, whereas the rule of law is that an oath shall never be deemed false or the witness perjured on the unsupported testimony of a single witness. But if this action lies, the ordinary rules of evidence would apply to it. The case of *Revis v. Smith* (a) is a very recent authority that though an affidavit made in a judicial proceeding is false, slanderous and malicious, no action will lie against the party making it. We have therefore a large collection of cases where from time to time parties have attempted to get damages in cases like the present, but in no one instance has the action ever been held to be maintainable. If for centuries many persons have attempted to get a remedy for injuries like the present, and there is an entire absence of authority that such remedy exists, it shews the unanimous opinion of those who have held the place which we do now, that such an action is not maintainable. The direction of the learned Judge was therefore right, and the verdict properly entered for the defendant.

WILLIAMS, J.—I will only add one reason why the rule of law may have been established as it now is. In *Cutler v. Dixon* (b) it was adjudged that if one exhibits articles to justices of the peace, “in this case the party shall not have for any matter contained in such articles any action upon the case, for they have pursued the ordinary course of justice in such cases, and if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain for fear of infinite vexation.” So here, if this action could be maintained, it would tend very much to discourage witnesses from giving evidence by the fear of infinite vexation.

CROMPTON, J.—I also am of opinion that the judgment

(a) 18 C. B. 126.

(b) 4 Rep. 14 b.

in the Court below was right. Evidence was tendered to shew express malice on the part of the defendant. My brother *Martin* held that, even if the slanderous matter was proved to be malicious and false to the knowledge of the defendant, the action would not lie. No action will lie for words spoken or written in the course of any judicial proceeding. In spite of all that can be said against it, we find the rule acted upon from the earliest times. The mischief would be immense if the person aggrieved, instead of preferring an indictment for perjury, could turn his complaint into a civil action. By universal assent it appears that in this country no such action lies. *Cresswell, J.*, pointed out, in *Revis v. Smith* (a), that the inconvenience is much less than it would be if the rule were otherwise. The origin of the rule was the great mischief that would result if witnesses in Courts of justice were not at liberty to speak freely, subject only to the animadversion of the Court. The attempts to obtain redress for defamation having failed, an effort was made in *Revis v. Smith* to sustain an action analogous to an action for malicious prosecution. That seems to have been done in despair. The rule is inflexible that no action will lie for words spoken or written in the course of giving evidence.

CROWDER, J.—The case of *Revis v. Smith* was argued most elaborately. The question was put and was unanswered—Is there any authority for the maintenance of an action for defamation in respect of matters given in evidence in a judicial proceeding? That was an attempt to get rid of the difficulty as to the action for defamation; but the Court thought that it was a matter of public policy to prevent the introduction of such an action. It was a

1859.

HENDERSON  
v.  
BROOMHEAD.

(a) 18 C. B. 126.

1859.

HENDERSON

v.

BROOMHEAD.

novel attempt to obtain a civil remedy for that which had never been allowed to be the ground of an action.

WILLES, J., had left the Court.

Judgment affirmed.

## IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

June 18

### THE NEW BRUNSWICK AND CANADA LAND AND RAILWAY COMPANY (LIMITED) v. MUGGERIDGE.

By the Joint  
Stock Com-  
panies Act,  
1856, (19 & 20  
Vict. c. 47,) Schedule,

**T**HIS was a proceeding in error upon the judgment of the Court of Exchequer, on a special case. The case and the judgment of the Court below will be found *ante*, p. 160.

Table B. (1,) "No person shall be deemed to have accepted any share in the Company, unless he has testified his acceptance thereof by writing under his hand in such form as the Company from time to time directs." In July 1856, a prospectus of a Company was issued at the foot of which was a form of application for shares. By the prospectus it was stated that all applications must be accompanied by a remittance of 2*l.* per share deposit on the number of shares applied for; and should any less number be allotted the amount paid in excess would be returned. The defendant paid to the bankers of the proposed Company 600*l.*, and filled up and sent to the directors the printed form at the foot of the prospectus, as follows:—"Gentlemen,—Having paid into the hands of the bankers of the proposed Company the sum of 600*l.*, I request you will allot me (300 shares); and I hereby agree to accept such shares or any less number, and to pay the future calls thereon." The directors allotted to the defendant (250 shares), and returned him 100*l.* the balance of his deposit. In August, 1856, a printed copy of the memorandum and articles of association, at the foot of which was a form of memorandum to be signed by a person accepting shares and consenting to be registered as a shareholder, was sent to the defendant. The Company was registered, and a certificate of incorporation was given under the Joint Stock Companies Acts, 1856, 1857, on the 25th of September, 1856. In April 1857, the secretary of the Company wrote to the defendant that the warrant for interest on his shares was ready, and offering to forward it on receiving the articles of association signed. The defendant, by letter signed by him, applied for the interest warrant and his share certificates. The secretary wrote in answer enclosing a printed copy of the articles of association for the defendant's signature, stating that on receipt of it he would forward the share certificates and interest warrants. The defendant *never signed the memorandum of consent to be a shareholder*, but his name was placed on the register of shareholders in respect of the shares allotted to him. In an action for calls:—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that, assuming it to be found as a fact that the Company had directed the acceptance of shares to be in the form appended to the articles of association, the defendant was not a shareholder in the Company.

*Bovill*, with whom was *Macaulay*, now argued for the plaintiffs.—The question is, whether the defendant was a shareholder in the Company. By the Joint Stock Companies Act, 1856, 19 & 20 Vict. c. 47, s. 9, the memorandum of association may be accompanied by articles of association, signed by the subscribers to the memorandum of association; but if no such regulations are prescribed, or so far as the same do not extend to modify the regulations contained in the Table marked B. in the schedule, such regulations are to be deemed the regulations of the Company, and shall bind the Company to the same extent as if they had been inserted in the articles of association, and such articles had been registered. The 19th section enacts that “every person who has accepted any share in a Company registered under that Act, and whose name is entered in the register of the shareholders, shall for the purposes of the Act be deemed to be a shareholder.” In Table B., “Regulations for the management of the Company” (1). “No person shall be deemed to have accepted any share in the Company unless he has testified his acceptance thereof by writing under his hand, in such form as the Company from time to time directs.” By section 16 the Company is to keep a register of the names of the shareholders, and the shares held by each of them. And by section 26 the register is made evidence of any matter by the Act directed or authorized to be inserted therein. Here the name of the defendant is on the register. That is evidence that he is a shareholder. The defendant answers that he has not accepted the shares in the manner prescribed. If he is right, a person who has received dividends and paid calls for many years may turn round and say that he is not a shareholder on account of some informality in the signing of the consent to become a shareholder. [*Crompton*, J.—All these

1859.  
 NEW  
 BRUNSWICK  
 AND  
 CANADA  
 RAILWAY Co.  
 v.  
 MUGGERIDGE.

1859.  
  
 NEW  
 BRUNSWICK  
 AND  
 CANADA  
 RAILWAY CO.  
 v.  
 MUGGERIDGE.

inconveniences are incurred because the legislature thought it of the greatest importance to have a line drawn defining accurately who are and who are not shareholders.] The defendant comes within the definition of a shareholder in the 16th section. It is clear that he has accepted shares in the Company, because he received back 100% of his deposit, was content with the 250 shares allotted to him, and applied for his interest and share certificates in respect of them. In *Yelland's Case* (a) a joint stock Company having been completely registered, Yelland applied for and accepted shares, and paid a deposit. The Company's deed required that on its execution the names of the parties executing should be entered on the list of shareholders and be returned to the Stamp Office, and thenceforth they should have the privileges and be subject to the liabilities of shareholders. Yelland did not execute the deed, but the directors entered and returned his name. Vice Chancellor *Parker* held that his name was properly placed on the register of shareholders. [*Willes*, J.—The question there was, whether the petitioner was liable as a contributory. A person may be a contributory, though not a shareholder. When the case came before the Court of Appeal, Lord *Cranworth* treated the petitioner as not being a shareholder, and expressly said that he was not liable at law.] It does not appear in the present case that the form testifying acceptance of shares had been prescribed by the Company. The case does not state that there was any general regulation of the Company, or any provision in the articles of association to that effect. To the articles of association a form of assent was appended, but it does not appear that subscription to this was deemed abso-

(a) 5 De Gex & S. 395 ; S. C. on appeal, 21 L. J. Chan. 852.

lutely essential by the Company. [*Willes, J.*—The case shews that the form was sent to the defendant by the authority of the Company.] The Company are a different body from the directors, or the secretary. [*Crompton, J.*—From time to time they issued a printed form, with directions how it was to be filled up.] Supposing that the defendant is not a shareholder, he may be estopped from setting up that as against the plaintiffs: *The Cheltenham and Great Western Union Railway v. Daniel (a)*, *The Sheffield, Ashton-under-Lyne and Manchester Railway Company v. Woodcock (b)*. [*Crompton, J.*—In none of those cases were there negative words like those in the present case, viz., that no person shall be deemed to have accepted shares unless he has accepted in a particular form.] The words may be satisfied by holding them to mean that the party shall not be entitled to dividends unless he accepts in the manner prescribed, but the Company may waive it. In the *Waterford, Wexford, Wicklow and Dublin Railway Company v. Pidcock (c)* the shares were allotted only on condition that the deed should be executed.—They also referred to *Ex parte Cookney (d)*.

*Vernon Harcourt* (with whom was *Wilde*), for the defendant, was not called upon to argue.

ERLE, J.—We are all of opinion that the judgment ought to be affirmed. It must be assumed that the Court below found as a fact that the Company had directed that the acceptance of shares should be in the form appended to the articles of association. The judgment in the Court below proceeds on that ground. The argument of Mr. *Bovill* was directed to the question of fact. Assuming the fact to be found, we

(a) 2 Q. B. 281.

(b) 7 M. &amp; W. 574.

(c) 8 Exch. 279.

(d) 28 L. J., Chan. 12.

1859.  
NEW  
BRUNSWICK  
AND  
CANADA  
RAILWAY CO.  
v.  
MUGGERIDGE.

are bound to give the same judgment here. This case is distinguishable from those where persons have been held liable as shareholders by estoppel, because in none of the acts of parliament under which the questions have arisen has there been language similar to that here, viz., that "no person shall be deemed a shareholder" unless he has complied with the requisitions of the Act.

WILLIAMS, J.—I am of the same opinion. I think we must assume that the Company had directed the acceptance of shares to be in the form appended to the memorandum of association.

CROMPTON, J., CROWDER, J., and WILLES, J., concurred.

Judgment affirmed.

---

# Exchequer Reports.

---

TRINITY TERM, 22 VICT.

---

SOLOMON v. THE MASTER, WARDENS AND FREEMEN AND  
COMMONALTY OF THE MYSTERY OF VINTNERS IN THE  
CITY OF LONDON.

1859.

June 1.

THE first count of the declaration stated that, before the grievances, &c., the plaintiff was possessed of two houses adjoining each other, known as 2, Pilgrim Street, and 3, Pilgrim Street, under leases thereof respectively, as tenant thereof for certain terms of years then unexpired, which said houses then were ancient houses, and more than twenty years old; and, at and before the commission of the grievances, the said houses, and each of them, of right leant on and were supported by certain houses and buildings of the defendants; and the plaintiff, in respect of his possession of the said houses respectively, then of right had and enjoyed, and still of right ought to have and enjoy, support from the

The plaintiff was the owner of a house built on a hill having a descent towards the west. Next to the plaintiff's house was one belonging to another person, which adjoined a house belonging to the defendants. For upwards of thirty years the three houses had been out of the perpendicular leaning to-

wards the west. There was no evidence how the leaning originated, but it might have been seen by any person passing in the street. It did not appear when the houses were built, or that there had been any connection between them either in title, possession, or occupation. The lease of the defendants' house, which was the lowest or westernmost, having expired, and the house being out of repair, the defendants agreed with one R. that R. should pull down the house and rebuild it, and that the defendants would then grant R. a lease. R. pulled down the defendants' house. The house adjoining sank further towards the west, and the plaintiff's house, having lost its support, then fell down.

*Held*, that, the defendants' house not adjoining the plaintiff's house, the plaintiff had acquired no right to have his house supported by the defendants' house.

*Quere*, whether he would have acquired any such right if the plaintiff's house had immediately adjoined the defendants' house.

*Per Bramwell, B.*, that there was nothing to shew that the plaintiff's enjoyment of support for his house by the defendants' house had been open and as of right.

1859.  
SOLOMON  
v  
VINTNERS'  
COMPANY.

said houses and buildings of the defendants: Yet the defendants pulled down and caused to be pulled down, and removed and took away and caused to be removed and taken away, the support which the plaintiff of right had, whereby, and by such removal of the support, the defendants caused the plaintiff's two houses to fall down, and in the fall the houses broke and destroyed the plaintiff's goods then in the said houses, whereby the plaintiff not only lost his goods and the enjoyment of the houses during the term, but has become liable to the landlords under the covenants in his leases to keep and leave in repair the said houses.

Second count.—That the plaintiff, at the time of the grievances, was possessed of a house, known as 2, Pilgrim Street, as tenant thereof for a term of years then unexpired, which said house was then an ancient house more than twenty years old: that the house of the plaintiff then of right leaned on and was supported by a certain ancient house thereto next adjoining called or known as 1, Pilgrim Street, and the plaintiff, in respect of the possession of his house 2, Pilgrim Street, then of right had and enjoyed, and still of right ought to have and enjoy, support from the house then next adjoining, called 1, Pilgrim Street; and the house called 1, Pilgrim Street, was an ancient house and more than twenty years old; and the said house called 1, Pilgrim Street then of right leaned on and was supported by certain houses and buildings of the defendants next adjoining thereto, and of right had and enjoyed, and still of right ought to have and enjoy, support from the said houses and buildings of the defendants. And the plaintiff's house called 2, Pilgrim Street then of right leaned on and was supported by the said houses and buildings of the defendants through the said house 1, Pilgrim Street. And the plaintiff, in respect of his house 2, Pilgrim

Street, then of right had and enjoyed, and still of right ought to have and enjoy, support for his house from the said houses and buildings of the defendants through the said house 1, Pilgrim Street: Yet the defendants, knowing the premises, negligently and improperly pulled down, and caused to be pulled down the said houses and buildings of the defendants, and removed and took away, and caused to be removed and taken away the support which the said house 1, Pilgrim Street then of right had, and the support which the plaintiff then of right had for his said house; whereby, and by which removal of the support, and by the careless, negligent and improper manner in which the houses of the defendants were pulled down, the defendants caused the said house 1, Pilgrim Street, to give way, and thereby deprived the plaintiff of the support which his house 2, Pilgrim Street then had from the house 1, Pilgrim Street aforesaid and from the defendants' houses and buildings, and by so depriving the plaintiff's said house of such support caused it to fall down, and in the said fall the house broke and destroyed the plaintiff's goods.—There was a third count which was similar to the second, relating to 3, Pilgrim Street.

Pleas.—First: Not guilty. Second: That there was no such right of support as alleged. Whereupon issues were joined.

At the trial, before *Martin*, B., at the London Sittings after Hilary Term, it appeared that the defendants were the owners of two houses, 12 and 13, Broadway, the back of which abutted on the west side of 1, Pilgrim Street. The plaintiff was the lessee and occupier of Nos. 2 and 3, Pilgrim Street. The whole block of houses in Pilgrim Street had for upwards of thirty years leaned considerably from east to west, and rested against the defendants' houses in Broadway. It was proved that the

1859.

SOLOMON  
v.  
VINTNERS'  
COMPANY.

1859.  
~~~~~  
SOLOMON  
v.  
VINTNERS'  
COMPANY.

defendants' houses were out of the perpendicular, leaning to the westward, the top of the wall overhanging about fifteen inches in that direction. The condition of the houses in this respect was obvious to persons passing in the street, and the attention of the officers of the Company had been particularly called to it about four years previously. The projection of the defendants' houses was said to have been caused by the pressure of the houses in Pilgrim Street. The houses 12 and 13, Broadway, being out of repair, an agreement was entered into by the defendants, dated the 14th of May, 1857, by which the defendants agreed with one Robins that, when 12 and 13, Broadway should have been pulled down and new houses should have been built on the sites thereof, they would grant him a lease of the premises for sixty years, and Robins, "for himself, his heirs, executors, administrators and assigns, did thereby agree with J. Lomas, as agent duly authorized and appointed for and on behalf of the defendants, and his executors, administrators and assigns, that Robins would at his own costs pull down the said messuages," &c. And Robins further covenanted "that he would indemnify and keep indemnified the said Company, their successors and assigns, from all costs, charges, damages and expenses attending, or which may be incurred by the pulling down the said messuages or tenements and the party walls thereof, or any or either of them, or in any wise relating thereto." In pursuance of this agreement Robins pulled down 12 and 13, Broadway, and in consequence of the withdrawal of the support afforded by these houses, the plaintiff's houses, 2 and 3, Pilgrim Street, cracked and fell in, destroying the plaintiff's stock in trade. Upon this evidence the learned Judge intimated his opinion that the defendants were not liable, and directed a nonsuit to be entered, reserving leave to the plaintiff to move to enter a verdict; the Court to have power to make any amendment in the

pleadings that might be necessary to impose any liability upon the defendants which could be legally imposed, if they were not liable on the pleadings; it being to be assumed, for the purpose of the motion, that the houses fell by reason of the negligent acts of Robins.

*Blackburn*, in Easter Term (April 16), having obtained a rule nisi accordingly,

*Hawkins* and *Keane* (with whom was *Edwin James*) now shewed cause.—The first question is, whether, assuming that the plaintiff had acquired a right of support, and that some person is liable to him for the damage he has sustained, that liability attaches to the defendants or to Robins. Robins was not the agent of the defendants, he was acting for himself, and for his own benefit in pulling down the houses in Broadway. The plaintiff's right of support was not a right against a particular person (*a*). Robins's covenant imposed on him the duty of taking down the houses in a proper manner, which would imply a duty to put up all proper shores to prevent the adjacent houses from being prostrated by his operations. If he failed to put up such shores it was an act of negligence on his part for which he may be liable, but with which the defendants had nothing to do. This action is therefore not maintainable, unless upon the ground that the defendants had no right at all to pull down their own old houses and rebuild new houses instead. But it is incontestable that they would have been at liberty to do so if proper shores had been put up to support the adjacent houses during the repairs.—Secondly, the plaintiff's houses had acquired no right of support. No legal origin of such a right was proved, as possibly might have been the case had it been shewn that the plaintiff's and the defendants' houses had been built by the same person, or originally held under

1859.  
  
 SOLOMON  
 v.  
 VINTNERS'  
 COMPANY.

(*a*) Gale on Easements, 313; Dig. book 8, tit. 5, c. 6, s. 2.

1859.  
  
 SOLOMON  
 v.  
 VINTNERS'  
 COMPANY.

one title (*a*), or that they ever had been under a common roof (*b*). If any easement exists at all it is not such as to prevent the defendants from repairing. The *Civil Law* recognised the “servitus oneris ferendi,” which imposed on the owner of the servient tenement the obligation, not only of supporting the dominant edifice, but also of keeping his own buildings in such a state of repair as should enable them to sustain the pressure. The mutual rights of the dominant and servient tenement, in case it became necessary to do repairs to the servient tenement, are thus stated in Gale on Easements, p. 313:—“This obligation to repair was however strictly construed, and did not carry with it as an incident any obligation to furnish support to the dominant tenement during any necessary reparation of the servient tenement. In this respect the owner of the dominant tenement was bound to take care of himself, by shoring or other means, or, if he neglected to do so, ‘he might take down his own house and rebuild it’ when the wall was restored” (*c*). But in fact no grant of any easement can be presumed. According to the law of England it is not enough to raise a presumption of a grant of a right of support, to shew that the defendants might have known that these houses were all leaning one upon the other, unless it could be shewn that the defendants knew it and had the means of resisting the exercise of the supposed right. In Gale on Easements it is said (*d*):—“Supposing, however, that some deviation from the perpendicular should originally have existed, or have been caused subsequently by the imperfect state of the building, but to so small an extent, or in such a position as not to be apparent to the owner of the adjoining house, the ignorance of the neighbour would exclude

(*a*) See *Peyton v. The Mayor of London*, 9 B. & C. 725 : per Lord Tenterden, ib. 736. Gale on Easements, 229.

(*b*) Gale on Easements, p. 229, note *a*.

(*c*) Citing Dig. bk. 8, tit. 5, l. 8.

(*d*) Page 229.

the presumption of that 'negligence and patience' from which alone his consent to the imposition of the easement could be inferred."

1859.  
  
 SOLOMON  
 v.  
 VINTNERS'  
 COMPANY.

*Blackburn and Honyman*, in support of the rule.—It was proved that for thirty years the block of houses in Pilgrim Street, two of which are the plaintiff's houses, were supported by the defendant's houses as a buttress, in a manner which was obvious and visible to every one who passed by. The defendants made a contract with Robins by which he was bound to pull down the buttress houses, and the support being thus taken away the plaintiff's houses fell. Now the right of support of land in its natural state is an incident of property. A right of support for a house by the adjacent natural soil is an easement which may be acquired by twenty years' enjoyment. And in like manner a right to artificial support, that is by another house, may be gained by twenty years' enjoyment. On this subject Mr. Gale says (p. 228):—"A question of equal practical importance, but presenting greater difficulties, and not elucidated by any direct authority, arises where the owner of an ancient house claims a right to have it lean against and be supported by the house of his neighbour. The obstacle to the acquisition of this easement by user arises from the natural secrecy of the mode of its enjoyment and the consequent difficulty of shewing that it has been had with the knowledge of the owner of the servient tenement. \* \* \* If the manner of imposing the pressure be of such a manifest and visible nature as to afford the requisite indication to the adjoining owner, it would appear that an easement of this kind may be acquired in the same manner as any other easements." [*Pollock*, C. B.—The instance he puts of a beam inserted into a neighbour's wall is a very different matter.] There was ample evidence of the defendants' knowledge of the support which the plaintiff's houses were

1859.  
 ~~~~~  
 SOLOMON  
 v.  
 VINTNERS'  
 COMPANY.

enjoying. It would have been no answer that the defendants could not have interfered with the support without pulling down their own houses. In *Gayford v. Nicholls* (a) Lord *Wensleydale* said, "This is not a case in which the plaintiff has the right to the support of the defendant's soil (which in that case was made ground), either by virtue of a twenty years' occupation, or by reason of a presumed grant or by a presumed reservation where both houses were originally in the possession of the same owner;" implying that in each of those cases a grant might have been presumed. The effect of the decisions in *Rowbotham v. Wilson* (b) and *Humphries v. Brogden* (c) is that, *prima facie*, the right of support must be presumed to be absolute, though, if evidence be given that the right is qualified, the qualification is effectual. It is not to be presumed that the grant of support by the defendants was subject to any exception. The leaning of the several houses on each other was as obvious as the pressure of a set of chambers on the top floor of a house upon the several floors below. If in such a case the ground floor was pulled down and the rooms above prostrated, the owner of the top floor would have a right of action against the owner of the ground floor. A similar right of support has been acquired in the present case. For the purposes of this rule it must be taken to be proved that for twenty years the plaintiff's houses leant, through No. 1, Pilgrim Street, on the defendants' houses. [*Channell*, B.—In the case of chambers, the floors are built at the same time.] It is a fallacy to suggest that the defendants could not have resisted the encroachment by the plaintiff's houses. They could have done so by means of the old writ "*quod permittat*." *Baten's Case* (d) shews that in order to have the encroachment removed, it would have been enough to shew

(a) 9 Exch. 702. 708.

(b) 6 E. & B. 593; S. C. in error, 8 E. & B. 123.

(c) 12 Q. B. 739.

(d) 9 Rep. 53 b. See also *Perruddock's Case*, 5 Rep. 101 b.

that it overhung the defendant's land. [*Martin*, B.—The plaintiff did not build into any part of the aerial space extending over the ground belonging to the defendants.] The Vintners' Company might have declared, in an action on the case, that they were owners of a house, and that the now plaintiff maintained a house in such a position as to push the intervening house upon them. [*Martin*, B.—That declaration would shew no cause of action at all.] An action would have been maintainable by the defendants for the original displacement of No. 1 by No. 2, against the owner of No. 2. The right, having been enjoyed de facto, must be presumed to have had a legal origin, if there ever was any means of resisting it, and a possible legal origin. If, without a legal right to do so, the plaintiff maintained his houses in such a position as to press and weigh upon the houses in Broadway, that would be ground for a "quod permittat." [*Bramwell*, B.—Suppose the leaning over was caused by the houses in Broadway giving way and dragging with them the plaintiff's houses, would you say that the Vintners' Company would have had a cause of action?] An action might have lain for continuing the consequent encroachment, though the original trespass might have been excused, as in case of a continuing trespass when the original trespass is excusable as occasioned by the defect of the plaintiff's fences. [*Pollock*, C. B.—If I build a wall at the extremity of my land, and my neighbour plays rackets against it for twenty years, is it contended that he would acquire a right to have it kept up? *Bramwell*, B.—Probably a right not to have it pulled down, if he had used it for that purpose as of right. *Bramwell*, B., referred to *Rex v. Rosewell* (a) and *Chauntler v. Robinson* (b), and *Pollock*, C. B., to *Arkwright v. Gell* (c).] If the weight of the plaintiff's houses de facto rested upon


1859.

SOLOMON  
v.  
VINTNERS'  
COMPANY.

(a) 2 Salk. 459.

(b) 4 Exch. 168.

(c) 5 M. &amp; W. 203.

1859.  
  
 SOLOMON  
 v.  
 VINTNERS'  
 COMPANY.

the defendants' houses in Broadway, the case comes within the Prescription Act. That point did not arise in *Peyton v. The Mayor of London* (a). In *Brown v. Windsor* (b) the defendant, having twenty-seven years previously given leave to the plaintiff to rest his house on the defendant's wall, carelessly made an excavation by which he weakened his wall and consequently injured the plaintiff's house: and it was held that an action was maintainable for such injury. [*Bramwell*, B.—Suppose the owner of No. 1, Pilgrim Street had acquired a right against the defendants and afterwards released it, could the plaintiff have prevented him from doing so?] In *Stansell v. Jollard* (c) Lord *Ellenborough* held that where a man had built to the extremity of his soil, and had enjoyed his building above twenty years, upon analogy to the rule as to lights he had acquired a right to a support, or as it were of leaning to his neighbour's soil, so that his neighbour could not dig so near as to remove the support; but that it was otherwise of a house newly built. That is in accordance with *Palmer v. Fleshees* (d) and *Hide v. Thornborough* (e) and the observations of Lord *Campbell* in *Humphries v. Brogden* (f). The presumption of a grant of a right of support in case of a house leaning on adjoining soil and acquiring a right of support by such soil is stronger than that which is necessary here. It is not easy to see how the owner of land can prevent a building erected on his neighbour's land adjoining his own from enjoying support by his own land. But, in the present case, the Vintners' Company might have effectually interfered to prevent the continuance of the enjoyment of support. If the plaintiff had a right of support, the withdrawal of the support is a wrong for which an action lies independently of any consequential damage: *Nicklin v.*

(a) 9 B. & C. 725.

(b) 1 C. & J. 20.

(c) *Selwyn's Nisi Prius*, 435.

(d) 1 Siderfin, 167.

(e) 2 Car. & K. 250.

(f) 12 Q. B. 739. 749.

*Williams (a)*, *Bonomi v. Backhouse (b)*. If the act is itself unlawful the employer is responsible, and it is unimportant whether it was done by a contractor or a servant: *Ellis v. The Sheffield Gas Consumers' Company (c)*. In ordering Robins to pull down the house, the defendants should have taken care that in removing the support of the plaintiff's house he provided a substitute. [*Pollock*, C. B.—Does it amount to more than this?—"Take the house down. Respect other people's rights, and make the best of it."] Robins indemnifies the Company. The defendants had a right to have their houses taken down on certain conditions, which have not been fulfilled, and as by the taking down of the wall, and not by any negligence on Robins's part, the plaintiff's houses were thrown down, the defendants are liable: *Trower v. Chadwick (d)*. The defendants have prevented the enjoyment of the easement granted by themselves, which they cannot lawfully do: *Gale on Easements*, 234, 248. It is suggested that such an easement as that now claimed is unknown to the law of England: the answer is that such an easement was recognised in *Richards v. Rose (e)*, where *Pollock*, C. B., in delivering the judgment of the Court, said:—"It seems to be clear that where a number of houses are built upon a plot of ground, all the houses belonging to the same person being all built together, and each requiring the mutual support of its neighbours for their common protection and security, such right of mutual support equally exists whether the owner parts first with one house and then with the other, or with two together, the ownership of the latter being afterwards divided." In *Pyer v. Carter (f)* the existence of the easement was less apparent than in the

1859.  
  
 SOLOMON  
 VINTNERS'  
 COMPANY.

(a) 10 Exch. 259.

(b) 27 L. J. Q. B. 278.

(c) 2 E. &amp; B. 767.

(d) 3 Bing. N. C. 334.

(e) 9 Exch. 218.

(f) 1 H. &amp; N. 916.

1859.  
~  
SOLOMON  
v.  
VINTNERS'  
COMPANY.

present case, and yet it was held that the owner of the servient tenement was bound to ascertain what easements the owner of the adjoining house exercised.

*Cur. adv. vult.*

The following judgments were now delivered

POLLOCK, C. B.—I have to deliver the judgment of myself, my brother *Martin*, and my brother *Channell*; my brother *Bramwell* does not differ in the result, but I believe he will express his own views. He agrees with the judgment of the Court, but does not adopt all the reasons upon which our judgment proceeds.

The plaintiff complained of an injury occasioned to his dwelling-house by the taking down and removal of two houses, the defendants' property, under the circumstances after mentioned. The facts proved were these:—The plaintiff was the owner of a house in Pilgrim Street in the city of London. His house was built on a hill having a descent towards the west. There was a house next below his and adjoining to the plaintiff's house belonging to a third person, and the defendants were the owners of the two houses next adjoining. One of the defendants' houses was a corner house of the street. For upwards of thirty years the four houses were all of them out of the perpendicular, leaning to the west, and this might have been seen by any one passing by. There was no evidence how or when this occurred or when the houses were built, or that there was any connexion between the houses either in title, occupation, possession or otherwise. In 1857 the lease of the defendants' houses expired, and they entered into a contract with a person of the name of Robins, that he should pull them down and erect two other houses in their place, and that, upon this being done, they would grant him a

lease at an agreed rent. Robins proceeded to pull down the houses and in consequence damage was caused to the plaintiff's house. And the question is whether these facts shew any liability on the part of the defendants. For the purpose of the argument, it is to be assumed that Robins acted with negligence. The defendants contended that the facts before stated afforded no evidence that the plaintiff had acquired, or had, as alleged by his declaration, a right to have his house in any way supported by the house of the defendants; and that they were not liable for the negligence of Robins, their contractor, in taking them down under the contract referred to. The plaintiff, on the other hand, contended that upon the facts proved he had acquired a right to the support of the defendants' houses, and that if the defendants, by themselves or their servants, had taken the houses down and deprived the plaintiff of the support, the very act of removing the support to which he was entitled, however carefully done, would entitle him to maintain an action against the defendants; and that the taking down being an act done by Robins by their authority and direction, was the same as if it had been done by themselves. It was admitted by the learned counsel for the plaintiff that, on the existing authorities, the defendants would not be responsible for the mere negligence of Robins. My brother *Martin* at the trial was of opinion that the defendants were not liable, and directed a nonsuit, with leave to the plaintiff to move to enter the verdict for him, in which event it was agreed that all further questions should be referred to an arbitrator. A rule was accordingly obtained which came on for argument in the course of last Term.

It seems now to be well settled that the right of one man's land to support from the adjoining land is not an easement or in the nature of an easement at all but

1859.  
SOLOMON  
VINTNERS'  
COMPANY.

1859.  
  
 SOLOMON  
 v.  
 VINTNERS'  
 COMPANY.

a natural right, like the right to the flow of the water in a natural river: *Rowbotham v. Wilson* (a). But the right to support for one building from an adjoining building is certainly not a natural right. It may arise in different ways. In *Partridge v. Scott* (b), *Alderson, B.*, in delivering the judgment of the Court with regard to a right very analogous, says, that "rights of this sort if they can be established at all must have their origin in grant." In *Pryton v. The Mayor of London* (c) Lord *Tenterden* intimated that if it appeared that both houses were originally built by the same owner the right to support might exist. In *Richards v. Rose* (d) this Court held that, in the latter case, such a right or easement did exist, and the right was thus recognised by the civil law.

If the house removed had been the next adjoining the plaintiff's we should have felt much embarrassed by some cases and dicta. In *Stansell v. Jollard* (e) and *Hide v. Thornborough* (f) such a right of support is stated to be gained if the houses have stood for twenty years; and in *Humphries v. Brogden* (g) Lord *Campbell* refers to these cases. It is extremely difficult to see how the circumstance of the houses having stood for twenty years makes any difference, or creates a right where houses are supposed to have been built by different adjoining land-owners, each with its own separate and independent walls, but upwards of twenty years ago one of them got out of the perpendicular, and leaned upon and was supported in part by the others, so that if the latter were removed the other would fall: it cannot be a right by prescription, which supposes a state of things existing before the time of legal memory.

(a) 8 E. & B. 123.

(b) 3 M. & W. 220.

(c) 9 B. & C. 736.

(d) 9 Exch. 218.

(e) Selwyn's Nisi Prius, 435.

(f) 2 Car. & K. 250.

(g) 12 Q. B. 749.

Nor does it seem to us to be a right under the Prescription Act, 2 & 3 Wm. 4, c. 71, which has been hitherto confined to rights in their nature of a perpetual and permanent character, and the ownership of which is in fee simple.

It seems to us that, in the absence of all evidence as to origin or grant, the only way in which such a right can be supported is that suggested by Lord *Campbell* in *Humphries v. Brogden*, namely, an absolute rule of law similar to that which is stated to have existed in the civil law. But there is no authority for any such rule to be found, at least none was stated to us. Lord *Campbell* compares it to a right to light. But that right is created by the express enactment of the 3rd section of the statute before referred to. And it seems contrary to justice and reason that a man, by building a weak house adjoining to the house of his neighbour, can, if the weak house gets out of the perpendicular and leans upon the adjoining house, thereby compel his neighbour either to pull down his own house within twenty years, or to bring some action at law, the precise nature of which is not very clear; otherwise it is said, an adverse right would be acquired against him.

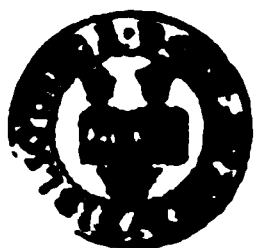
But these questions we refer to because they were matters of argument at the bar. It is not necessary to decide them in the present case. The defendants' houses were not next adjoining the plaintiff's; there was an intermediate one, and it is necessary to consider whether any of the grounds suggested as creating a right are supported by the evidence. As to any right arising from the non-removal of the defendants' houses (assuming it to be that a man who has a house suitable for his own purposes must pull it down within twenty years, otherwise his neighbour, whose house may lean upon it, would gain an adverse right of support), the evidence is defective, for it is plain that, during much the greater part of the thirty years during

1859.

SOLOMON  
v.  
VINTNERS'  
COMPANY.

1859.

SOLOMON  
v.  
VINTNERS'  
COMPANY.



which the houses were out of the perpendicular, the defendants' houses were in the possession of tenants under leases. The defendants could not have pulled them down if they had been disposed to do so.

But it was strongly argued that the defendants might have maintained an action against the plaintiff during the first twenty years of the leaning of his house. When a house built upon the edge of a man's land gets out of the perpendicular, and leans or hangs over his neighbour's land, it no doubt occupies a space belonging to his neighbour, the rule of law being, *cujus est solum ejus at usque ad coelum*. But, assuming the neighbour could maintain an action to recover the space, or for interfering with it, the defendants could not have maintained an action for the plaintiff's use of the projection over the soil of the intervening owner. It was said, however, that prior to the 1st of June, 1835, now twenty-four years ago, a writ of *quod permittat* might have been brought; but even if this were so it would be of no avail, for during fourteen of the twenty years this action has been abolished. It was said that since then an action on the case might have been brought. But we apprehend that, upon the evidence in this case, the defendants could have maintained no such action. There was no evidence how the leaning originated. It may have been that the defendants' houses were the first to give way, and that this was caused by some excavation in the street for which they were in no wise responsible, and that the getting out of the perpendicular of the plaintiff's house originated from the same cause. Under such circumstances we think the defendants could not have maintained an action on the case against the plaintiff. If the only evidence had been that in this case, we entertain no doubt the Judge would have been bound to have held that there was no evidence to go to the jury.

The question therefore really comes to this—is there any authority in the law for the existence of such a right as that claimed by the plaintiff? We find none where the houses do not adjoin, and although we possibly might have acted upon the cases before referred to, if the circumstances had been the same, we are not disposed to extend the principle further than we feel ourselves compelled by authority. If there be such a rule of law as that suggested by Lord *Campbell* in *Humphries v. Brogden*, the plaintiff's contention may be right. But, as already observed, we have not been referred to, and are not aware of any authority to this effect. The rule, therefore, to set aside the nonsuit will be discharged.

1859.

SOLOMON  
v.  
VINTNERS'  
COMPANY.

BRAMWELL, B.—I think that the rule ought to be discharged, and I do not dissent from any reason given by my Lord for discharging the rule. But the reasons there given seem to me to involve questions of very great difficulty and importance, and I would rather not pronounce an opinion on them without a great deal more consideration than I have been able to give them. I certainly would not do it in any case without some necessity for so doing, which I do not see here, because there is ground upon which the defendants are entitled to our judgment; and it is this. Where a house leans as this does, the owner of it may make two claims in respect of it upon his neighbour, one a general right to impend over and occupy a portion of his ground as it were, and to hang over and occupy a portion of air or the space over it; the other right, a right to support from the walls of the house of his neighbour. Now the former claim is here out of the question, because the plaintiff's house did not impend over the defendants' land; therefore the question is limited to the latter; and ac-

1859.  
—  
SOLOMON  
v.  
VINTNERS'  
COMPANY.

cordingly Mr. *Blackburn's* contention was, that the plaintiff had a right to have his house supported by the intermediate house which the plaintiff said leaned upon the defendants' house. The right so claimed, as I understand it, was this, viz. a right to have the support while the defendants' house stood there,—to have the defendants' house continue to stand there to give that support,—and, when the defendants' house would no longer stand of itself, a right on the part of the plaintiff to go in and repair it, and make it sufficient to bear the weight of the plaintiff's house. Now that is a claim which to my mind is extravagant upon the very enunciation of it; but for aught I know it is one which may exist in point of law. Supposing it does exist it must be either as a matter of absolute right, or as a matter of prescription, or under the Prescription Act, or as founded on some supposed lost grant. In any of these cases it can only exist if the benefit was one that was enjoyed as of right, which cannot be unless it was openly and visibly enjoyed. An enjoyment must neither be *vi, precario* nor *clam*, it must be open. Now when one house visibly leans towards another, a person may make a tolerably shrewd guess that it is partly supported by the other; but it will be only a conjecture. No one can say but that both may have slipped and both stand. I think the expression is, "upon the square," self-supporting. But it may turn out to be the fact, that the house which leans towards the other, affords as much support to that other by their mutual cohesion as the other affords to it. In fact it is impossible to say which house is being supported. It is true that in this case when the defendants' house was removed the plaintiff's house fell in; but probably nobody who saw the block of buildings would have guessed that such a result would have followed. If any one had done so it would

have been but a matter of conjecture. Therefore, supposing that the plaintiff, for more than twenty years, had an enjoyment which he says now ought to continue, it was an enjoyment *clam*, not open, and consequently not as of right. It appears to me, therefore, that on that ground there has been nowhere that which is called adverse enjoyment or enjoyment as of right, of that which Mr. *Blackburn* claimed for his client; consequently that no title was gained under any of the different ways in which it has been surmised it might have been gained. It seems to me on that ground (of course I bear in mind that there is an intermediate house) that the defendants are entitled to our judgment.

1859.  
 SOLOMON  
 v.  
 VINTNERS'  
 COMPANY.

MARTIN, B.—If I had been one of the jury I should certainly have found a verdict for the defendants on the ground stated by my brother *Bramwell*. But it strikes me that, in that view of the case, it was a question for the jury and not one of law.

Rule discharged.

LIVERSIDGE v. BROADBENT.

June 3.

THE declaration stated that, at the time of the making the agreement hereinafter mentioned, the defendant was indebted to one William Clapham in a sum of money plaintiff on two bills of exchange for 60*l.* and 53*l.* 13*s.*, one of which was dishonoured and the other about to become due, the plaintiff requiring some security proposed to C. that the defendant should guarantee the payment of the bills, when C. signed the following document:—"I hereby agree to authorize B. (the defendant) to pay L. (the plaintiff) or his order the sum of 113*l.* 13*s.*, the amount of two acceptances, towards my account for building the cottages at W. B. to debit my account with the above money: also L.'s receipt to B. I acknowledge shall be binding between myself and B. in the contract." At the foot of this document the defendant wrote "acknowledged," with his signature.—*Held*, that the plaintiff could maintain no action against the defendant to recover the money, since the document was merely an assignment of a chose in action, and there was no consideration for a promise to pay, inasmuch as the debt due from C. to the plaintiff was not extinguished.

The defendant being indebted to C. in a sum of 113*l.* 13*s.*, and C. being indebted to the

1859.

LIVERSIDGE  
v.  
BROADBENT.

exceeding 113*l.* 13*s.* and the interest and expenses hereinafter mentioned. And the said W. Clapham was then indebted to the plaintiff in a sum of money equal to the sum of 113*l.* 13*s.* and the interest and expenses hereinafter mentioned, for which said sum of 113*l.* 13*s.* the plaintiff then held two several bills of exchange for 60*l.* and 53*l.* 13*s.* respectively drawn by the plaintiff on the said W. Clapham and accepted by him payable to the plaintiff, and then unpaid; and the said several debts and the said two bills of exchange with the said interest and expenses being wholly unpaid, it was agreed by and between the plaintiff, the defendant and the said W. Clapham, in the words and figures following, that is to say,—“Wetherby, 22nd September, 1858. I hereby agree to authorize Mr. Stephen Broadbent, of Wetherby (meaning the defendant), to pay Mr. William Liversidge (meaning the plaintiff), or his order, the sum of 113*l.* 13*s.* the amount of two acceptances (meaning the said two bills of exchange), together with the expenses on the said two bills (meaning the said two bills) and interest thereon towards my account for building the cottages at Wetherby. Mr. Broadbent (meaning the defendant) to debit my account (meaning the said W. Clapham’s account) with the above money, also Mr. Liversidge’s (meaning the plaintiff) receipt to Mr. Broadbent (meaning the defendant), I (meaning the said W. Clapham) acknowledge shall be binding, between myself and the said Mr. Broadbent, in the contract. William Clapham. Acknowledged, Stephen Broadbent.”—Averments: that on the making of the said agreement the plaintiff accepted the same in full satisfaction and discharge of the said debt so due and owing to him by the said W. Clapham; and that the said W. Clapham also accepted the same in full satisfaction and discharge of the said debt so due and owing to him by the defendant; and that neither the plaintiff nor the said W. Clapham have at

any time demanded their said several debts so discharged as aforesaid; and that all conditions precedent have been fulfilled and everything has been done and has happened to entitle the plaintiff to the sum of 113*l.* 13*s.*, and the said sum of 113*l.* 13*s.* is still wholly unpaid to the said W. Clapham, and the said several bills are also wholly unpaid.—Breach: non-payment of the said sum of 113*l.* 13*s.*—There were also counts for money payable by the defendant for the use of the plaintiff, and money due on an account stated.

Pleas (inter alia).—First: that it was not agreed by and between the plaintiff and defendant and the said W. Clapham, nor did the said W. Clapham give any such authority as in the alleged agreement mentioned.—Secondly: that the plaintiff did not accept the said agreement in full satisfaction and discharge of the alleged debt alleged to have been due and owing to him by the said W. Clapham; nor did the said W. Clapham accept the said agreement in full satisfaction and discharge of the said alleged debt alleged to have been due and owing to him from the defendant.

Issues thereon.

At the trial, before *Willes*, J., at the last Yorkshire Assizes, it appeared that the defendant had contracted with a builder, named Clapham, for the erection of some cottages at Wetherby. Clapham being indebted to the plaintiff, who was a timber merchant, had accepted two bills of exchange drawn by the plaintiff on him. One of these bills which was for 60*l.* became due on the 18th September, 1858, and was dishonoured; the other bill which was for 53*l.* 13*s.* was not due until the 15th of October following. The plaintiff, requiring some security for his debt, proposed to Clapham that the defendant should guarantee the payment, and on the 22nd September the plaintiff and Clapham went to the defendant when the following document was signed.

1859.

LIVERSIDGE  
v.  
BROADBENT.

“ Wetherby, 22 Sept. 1858.

“ I hereby agree to authorize Mr. Stephen Broadbent, of Wetherby, to pay to Mr. W. Liversidge, or his order, the sum of 113*l.* 13*s.*, the amount of two acceptances, together with the expenses on the bills and interest thereon, towards my account for building the cottages at Wetherby; Mr. Broadbent to debit my account with the above money: also Mr. Liversidge receipt to Mr. Broadbent I acknowledge shall be binding between myself and Mr. Broadbent in the contract.

“ William Clapham.

“ Acknowledged,

“ Stephen Broadbent.”

It was objected, on the part of the defendant, that the agreement was no extinction of the debt due from the defendant to Clapham, and, consequently, there was no consideration for the promise. The learned Judge directed a nonsuit, reserving leave to the plaintiff to move to enter the verdict for him.

*Edward James*, in last Easter Term, obtained a rule nisi accordingly: against which

*T. Jones* (*Mistry* with him) now shewed cause.—There are two objections to the maintenance of this action: first, a chose in action is not assignable at law; and, secondly, there is no consideration to support the agreement. As no debt was due from the defendant to the plaintiff, it must appear either that the debt due from the defendant to Clapham has been transferred to the plaintiff by the consent of the three parties, or that there is good consideration for the defendant paying the plaintiff that debt. An action for money had and received will not lie, because there has been no transfer of the debt. In *Israel v. Douglas* (a),

(a) 1 H. Black. 338.

where it was held that such an action was maintainable, there was a good consideration to support the promise, viz. the extinguishment of the debt due from the defendant to the third party. Moreover, the authority of that case has been doubted. The present case resembles *Wharton v. Walker* (a), where one Lythgoe, being indebted to the plaintiff in the sum of 4*l.* 5*s.*, gave him an order upon the defendant, who was his tenant, to pay that sum out of the next rent that became due. The plaintiff transmitted the order to the defendant, but had not any direct communication with him upon the subject. When the next rent became due and was demanded by Lythgoe, the defendant produced the order, the amount of which he promised to pay to the plaintiff, and paid Lythgoe the difference between that and the sum due for rent, and thereupon Lythgoe gave him a receipt for the whole sum. It was held that the plaintiff could not recover the amount of the order from the defendant in an action for money had and received or upon an account stated. [*Martin*, B., referred to *Cuxon v. Chadley* (b).] Here there was no agreement between the three parties, which operated as an extinguishment of the debt due from the defendant to Clapham. [*Pollock*, C. B.—The whole matter was in fieri.]

The Court then called on

*Edward James* and *Cleasby* to support the rule.—The document in question is not simply an acknowledgment of a debt, but an authority to the defendant to debit Clapham's account with the 113*l.* 13*s.* It was an equitable assignment of the debt which Clapham could not revoke: *Crowfoot v. Gurney* (c). [*Bramwell*, B.—The marginal note of that case is not warranted by the decision.] The existence of

(a) 4 B. & C. 163.

(b) 3 B. & C. 591.

(c) 9 Bing. 372.


1859.  
 LIVERSIDGE  
 v.  
 BROADBENT.

a debt and the forbearance of the plaintiff to sue Clapham for it, is a sufficient consideration to support the agreement. [*Bramwell*, B., referred to *Oldershaw v. King* (a). *Martin*, B.—Suppose the plaintiff had sued Clapham, what answer would he have had?] A Court of equity would enforce the agreement, and that can only be on the ground that Clapham's debt was extinguished by it. It is sufficient if the defendant was constituted an agent for the purpose of paying over the money to the plaintiff. In *Lilly v. Hays* (b) a debtor of the plaintiff transmitted a sum of money to the defendant, who admitted having received it, and being afterwards informed that it was meant to be paid to the plaintiff, said he would so pay it. These statements were communicated to the plaintiff by the defendant's authority; and it was held that, on his failing to pay, the plaintiff might sue him for money had and received, and that the defendant could not allege a want of consideration moving from the plaintiff to himself. *Patteson*, J., there said: "Suppose that a debtor sent money to a general agent for the creditor, would there be any doubt that as soon as the agent received it he would be accountable to the creditor for it, as money had and received to his use? Would it be an answer that there was no consideration moving from the creditor to the agent? Or is it not a consideration if the money is sent to a general agent for the creditor and received by him, he informing the creditor of it?" So here, if the defendant had told the plaintiff that he had the money in a drawer at his house and would pay it over to him, if the defendant afterwards refused, the plaintiff might have recovered it in action for money had and received to his use. Here the defendant does not in express terms say that he will pay over the money, but he acknowledges the authority to pay. That amounts to an appropriation

(a) 2 H. & N. 399; in error, ib. 517.

(b) 5 A. & E. 548.

of the money, irrevocable except by the consent of all parties: *Walker v. Rostron* (a), *Hamilton v. Spottiswoode* (b). *Wilson v. Coupland* (c) is an authority that this transaction amounts to a transfer of the debt.—They also referred to Chitty on Contracts, p. 543, 6th ed.

1859.  
  
 LIVERSIDGE  
 v.  
 BROADBENT.

POLLOCK, C. B.—We are all of opinion that the rule ought to be discharged. Looking at the document alone, I do not know what passed, but there was evidence that Liversidge, the plaintiff, wanting some security for a bill of exchange which was overdue, and for another bill which was about to become due, got Clapham, his debtor, to sign this paper: “I hereby agree to authorize Mr. Stephen Broadbent, of Wetherby, to pay to Mr. Liversidge, or his order, the sum of 113*l.* 13*s.*, the amount of two acceptances, together with the expenses on the bills and interest thereon.” Now the mode by which Clapham would naturally authorize the defendant to pay the money to the plaintiff or his order would be by drawing on him a bill of exchange payable to the plaintiff’s order. In this respect the case differs from those relied upon by the plaintiff. The document goes on—“towards my account for building the cottages at Wetherby. Mr. Broadbent to debit my account with the money.” That does not mean “instantly,” so as to transfer the debt, but “debit my account with the money when you have paid it.” All that the defendant does is to add the word “acknowledged,” with his signature, which may only mean that he has received the agreement, and that when he gets the authority he will act upon it. I cannot see that there is any distinct agreement whatever,—at least to the effect stated in the first count. The debt due from Clapham to

(a) 9 M. & W. 411.

(b) 4 Exch. 200.

(c) 5 B. & Ald. 228.

1859.  
LIVERSIDGE  
v.  
BROADBENT.

the plaintiff is not extinguished, and there is nothing in the document to prevent the plaintiff from suing Clapham instanter on the bills of exchange. No plea founded on that document would afford any defence to the action. It is not necessary to go through the cases cited on the part of the plaintiff, because none of them apply. For these reasons I think that the learned Judge was right in directing a nonsuit.

MARTIN, B.—I am of the same opinion. There are two legal principles which, so far as I know, have never been departed from: one is that, at common law, a debt cannot be assigned, so as to give the assignee a right to sue for it in his own name, except in the case of a negotiable instrument; and, that being the law, it is perfectly clear that Clapham could not assign to the plaintiff the debt due from the defendant to him. That a debt may be assigned in equity there is no doubt, and I should rejoice if the scandal did not exist of there being one rule at law and another in equity. The other principle which would be infringed by allowing this action to be maintained, is the rule of law that a bare promise cannot be the foundation of an action: “*Ex nudo pacto non oritur actio.*” Applying those principles to the present case, I am clearly of opinion that the action cannot be maintained. The document begins, “I hereby agree to authorize Mr. Stephen Broadbent, of Wetherby, to pay to Mr. W. Liversidge, or his order, the sum of 113*l.* 13*s.*” That is nothing more than an agreement to authorize the defendant to pay to the plaintiff, or some one in his stead; and the signature of the defendant has no other meaning than that pointed out by the Lord Chief Baron. Nevertheless I will assume that the defendant did promise to pay the money to the

plaintiff; then there is the objection of a want of consideration to support the promise. The document goes on, "Mr. Broadbent to debit my account with the above money." If I thought that meant this—"You may now take a pen and write down 113*l.* 13*s.* to my debit, and thereby extinguish so much of your debt," I should agree with the plaintiff's counsel. But that is not the meaning of the document. The following words, "also Mr. Liversidge receipt to Mr. Broadbent I acknowledge shall be binding between myself and Mr. Broadbent in the contract," clearly shew what the real meaning is, viz. that when the defendant has paid the money to the plaintiff and got his receipt for it, then, and not before, he is to debit Clapham's account with the money so paid. No doubt a debtor may, if he thinks fit, promise to pay his debt to a person other than his creditor, and if there is any consideration for the promise he is bound to perform it. But here there was none whatever. There was no agreement to give time, or that the debt of Clapham should be extinguished,—no indulgence to him or detriment to the plaintiff. There was nothing in the nature of a consideration moving from the plaintiff to the defendant, but a mere promise by the defendant to pay another man's debt. No doubt, there are cases in which the Courts have been desirous to give their sanction to arrangements of this kind. Amongst others, *Lilly v. Hays* (a) was cited. But in that case the defendant had a sum of money in his hands which he admitted that he held for the plaintiff's use, and promised to pay to him; so that he was in the situation of an agent for the plaintiff, and on that ground it was held the plaintiff might recover it as money received to his use. The same observation applies to the case of *Walker v. Rostron* (b). There the

1859.

LIVERSIDGE

v.

BROADBENT.

(a) 5 A. &amp; E. 548.

(b) 9 M. &amp; W. 411.

1859.  
 LIVERSIDGE  
 v.  
 BROADBENT.

agent for the purchaser of goods undertook, by an agreement to which the vendor and purchaser were also parties, to pay bills of exchange, given for the price of the goods, out of certain specified funds which he expected to receive, and that was held to be an appropriation of the funds, irrevocable except by the consent of all parties. The same principle prevails with respect to bankers. A banker is in the position of a person having in his hands the money of another which he is at any moment liable to be called upon to pay, and the Courts have grasped at that to make a contract between the banker, his customer and a third party, for the payment of money to the latter, operate as a transfer of the money, so that an action for money had and received can be maintained for it. Here there is no money had and received to the use of the plaintiff. In *Israel v. Douglas* (a), there was a consideration to support the promise. Here there is nothing more than a transfer of a chose in action; and, without violating the two rules of law to which I have adverted, this action cannot be maintained.

BRAMWELL, B.—I am of the same opinion. Where the action for money had and received is maintainable, it is because certain facts exist, which, if fully stated on the record, would entitle the plaintiff to maintain an action. Whether the count for money had and received is the proper form, or not, is immaterial if there is a right of action. Test it in this way:—Suppose the jury returned a special verdict, it would then be seen whether money had and received was maintainable. I am by no means clear, whether my Lord's doubt as to there being any agreement by the defendant is well founded; but I do not decide on

(a) 1 H. Black. 239.

that ground, because it seems to me a question for the jury. My judgment proceeds on the grounds stated by my brother *Martin*, viz., that no man can be made liable on a contract without a consideration to support it, and that a chose in action is not assignable at law. I construe this document, not as an agreement that the defendant shall forthwith debit Clapham with the amount of the bills, and that the plaintiff shall give up his claim upon him, but as an authority to the defendant to pay the plaintiff that amount, and, when he has done so, to debit Clapham's account with the money. Then what consideration is there for a promise by the defendant to pay Clapham's debt? The defendant must be liable (if at all) by reason of some duty arising from contract; and that must be founded on a good consideration. In 2 Wms. Saund. p. 137 *g*, it is said: "The consideration to support an assumpsit must move from the plaintiff." Again, at p. 137 *h*, "Any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, is a sufficient consideration, if such an act is performed or such inconvenience suffered by the plaintiff with consent express or implied of the defendant." Here the plaintiff was under no obligation to do any act, or to forbear, or to suffer any inconvenience. I cannot see any consideration whatever for the promise, and therefore it is clear to my mind that the action is not maintainable. Then as to the authorities: *Crowfoot v. Gurney* (*a*) is a good authority for the plaintiff in the marginal note; but, if the law is to be read from the body of the case, it is against him, because the Court say that there was merely an equitable assignment of the debt. *Walker v. Rostron* (*b*) may be supported on this ground, that there was an agreement

1859.  
  
 LIVERSIDGE  
 v.  
 BROADBENT.

(*a*) 9 Bing. 372.

(*b*) 9 M. & W. 411.

1859.

LIVERSIDGE  
v.  
BROADBENT.

between the three parties that certain monies which the defendant expected to receive should, when received, be held by him on behalf of the plaintiff. If I direct my agent to receive my rent about to become due, not on my account but for C. D., and that is assented to by all parties, when the rent is paid it would be received on account of C. D. In *Walker v. Rostron* (a), Parke, B., in the course of the argument, makes use of this expression: "Is not an equitable assignment of a chose in action the same in equity as the assignment of a chattel at law? Then this is the case of a plaintiff suing the party who has agreed to become his agent for the amount of that equitable lien." That must be the principle upon which that judgment proceeded. At first I was inclined to think that *Hamilton v. Spottiswoode* (b) was in the plaintiff's favour, but now I think it is not, because in that case there was a consideration moving from the plaintiff. The declaration is ingeniously drawn, and contains an averment that the plaintiffs have waited for payment until the days mentioned in the order.

WATSON, B.—I am also of opinion that the rule ought to be discharged. *Israel v. Douglas* (c) is relied upon as an authority that money had and received may be maintained, but the correctness of that decision has been doubted in several subsequent cases. In order to maintain an action for money had and received, the money must have been received actually or constructively for the use of the plaintiff. Then, as to the first count: it alleges that the plaintiff and Clapham accepted the agreement in satisfaction and discharge of their debts. That averment is necessary in order to render the declaration good, for all the cases proceed on the ground that the debt due from the third

(a) 9 M. &amp; W. 411 419.

(b) 4 Exch. 200.

(c) 1 H. Black. 239.

party to the plaintiff was extinguished, and therefore there was a good consideration moving from him to support the defendant's promise. Here there was no extinguishment of Clapham's debt. The agreement is acknowledged by the defendant, but it is the document of Clapham; and there is nothing whatever in it to prevent the plaintiff from suing Clapham. It seems to me that there is a total want of consideration for the defendant's promise, and that the plaintiff has failed to prove his case.

Rule discharged.

1859.

LIVERSIDGE  
v.  
BROADBENT.

MYTTON v. THE MIDLAND RAILWAY COMPANY.

June 13.

THE first count of the declaration stated, that the defendants, before and at the time of the committing by them of the grievances, &c., were and still are common carriers for hire of passengers and their luggage, goods and chattels, upon their railway; and the plaintiff heretofore, to wit, on, &c., at the request of the defendants, became and was a passenger on a journey extending over, upon, and along their said railway; and the defendants as such common carriers received the plaintiff as such passenger into one of their carriages upon their said railway, and a portmanteau and its contents, being the luggage of the plaintiff, was then also received by them, as such common carriers as aforesaid, to

The plaintiff took at the Newport Station of the South Wales Railway Company a ticket from Newport to Birmingham, for which he paid the entire fare. The South Wales Railway extends from Newport to within twelve miles of Gloucester, which latter distance is traversed on the Great

Western Railway; and the Midland Railway Company have a line from Gloucester to Birmingham. By arrangement between the three Companies tickets are issued for the entire distance, and the fares are divided between them according to the mileage travelled on each line. At Gloucester the plaintiff took his portmanteau from the South Wales railway carriage and delivered it to a guard of the Midland Railway Company. On the arrival of the train at Birmingham the portmanteau was missing. The plaintiff having sued the Midland Railway Company for the loss:—*Held*, that the contract was an entire contract with the South Wales Railway Company to convey the whole distance from Newport to Birmingham, and consequently the Midland Railway Company were not liable.

1859.  
  
 MYTTON  
 v.  
 MIDLAND  
 RAILWAY Co.

be by them safely and securely conveyed, kept, carried and conveyed by the defendants, as such carriers as aforesaid, to wit, from Gloucester to Birmingham, and at the end of the said journey to be delivered to the plaintiff, for reasonable reward by the plaintiff paid, to wit, to the defendants in that behalf. Yet the defendants did not so safely or securely keep, carry, convey, or deliver the plaintiff's said luggage as aforesaid, and by the reason of the negligence, carelessness, wrongful act, neglect, or default of the defendants in that behalf, and not otherwise, the said luggage became and was and still is wholly lost to the plaintiff.—There was a second count, omitting the allegation that the defendants were common carriers.

The defendants pleaded, not guilty, together with pleas denying that the plaintiff became such passenger as alleged and that the defendants received the portmanteau for the purpose aforesaid.

The cause came on to be tried before the Lord Chief Baron, at the Middlesex sittings after last Hilary Term when a verdict was entered for the plaintiff for 56*l.*, subject to the following case:—

The South Wales Railway Company have a line of railway from Newport, in Monmouthshire, to Grange Court, about twelve miles from Gloucester; and from thence they run over a portion of the Great Western line of railway into the city of Gloucester, and into a station there of the Great Western Company. The defendants have, adjoining that station and under the same roof, but as separate property, a station of their own, and from this station they have a line to Birmingham; but as their line is a narrow gauge line and the lines of the other companies are broad gauge lines, there is necessarily a change of carriages at the Gloucester station.

Arrangements having been made by the traffic managers

of the said railways, by means of which passengers from Newport can be and are booked through from that place to Birmingham and vice versâ, these arrangements were and are regularly acted upon by the Companies, and the fares paid are divided by the Companies amongst themselves according to the mileage travelled over each line, at a clearing-house where the clerks of the said Companies meet for that purpose. The fare is paid at the office of starting where the ticket is issued.

1859.  
MYTTON  
v.  
MIDLAND  
RAILWAY Co.

On the 18th of August last the plaintiff took, at the office of the South Wales Railway Company at Newport, two third class through tickets for Birmingham, to go by the said South Wales, Great Western and defendants' lines, and paid to the South Wales Railway Company the fares demanded; and these fares were in fact afterwards divided in the due proportions between the three Companies. The plaintiff delivered his portmanteau to the porter of the South Wales Railway Company at Newport, who placed on it a ticket marked "S. W. R., viâ Midland from Gloucester. Newport to Birmingham."

No charge was made or paid for the carriage of the portmanteau or its contents beyond the usual charge for the conveyance of passengers. The plaintiff and his wife travelled to Gloucester; and, on the arrival of the train there, the plaintiff took his portmanteau from the South Wales railway carriage, in which it had been placed, and delivered it to the guard of the defendants, the Midland Railway Company, who placed it in the luggage van of the defendants' train, which was just starting for Birmingham; and the plaintiff and his wife got into a third class carriage of the Midland Railway Company and were conveyed to Birmingham in their train. On the arrival of the train at Birmingham the plaintiff's portmanteau was missing, but it was afterwards found by the Birmingham police in a street in Birmingham broken open and part of its contents

1859.  
  
 MYTTON  
 v.  
 MIDLAND  
 RAILWAY CO.

gone. The portmanteau contained the plaintiff's personal luggage (a).

By "the South Wales Railway Act, 1845," (8 & 9 Vict. c. cxc.) s. 50, it is enacted as follows:—"Every passenger travelling upon the railway may take with him at his own risk his ordinary luggage not exceeding one hundred pounds in weight for first class passengers; sixty pounds in weight for second class passengers, and forty pounds in weight for third class passengers, without any charge being made for the carriage thereof."

By the 204th section of the Midland Railways Consolidation Act, 1844, (7 & 8 Vict. c. xviii.) it is enacted, "That every passenger travelling upon the railway in a first class carriage may take with him his ordinary luggage not exceeding one hundred pounds in weight; and every passenger travelling in a second class carriage may take with him his ordinary luggage not exceeding sixty pounds in weight; and every passenger travelling in a third class carriage may take with him his ordinary luggage not exceeding forty pounds in weight, without any charge to be made for the carriage thereof."

The defendants contend that the contract of conveyance from Newport to Birmingham was made by the plaintiff with the South Wales Railway Company, and that the defendants are not liable to this action.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover the value of the portmanteau or its contents.

(a) The case also stated that the portmanteau contained certain sketches, made by the plaintiff, who was an artist, in South Wales, for the purpose of making from them finished pictures; and another question raised by the case

was whether these sketches were paintings within the meaning of the Carriers Act, 10 Geo. 4 & 1 Wm. 4, c. 68. The decision of the Court renders it unnecessary to notice this point.

*Mihoard* (*Hawkins* with him) argued for the plaintiff (June 8).—The only authority bearing on the point is that of *Collins v. The Bristol and Exeter Railway Company* (a), but that does not conclude this case. Here there was a contract by the plaintiff with the defendants, the Midland Railway Company, to carry him and his luggage from Gloucester to Birmingham. The case is distinguishable from *Scothorn v. The South Staffordshire Railway Company* (b), because here the three Companies divided the fares according to the mileage travelled over each line. The South Wales Railway Company, to whom the entire fare was paid, were the agents of the two other Companies, for the purpose of binding them by a contract with the plaintiff to carry him on their lines. The portmanteau was not delivered to the South Wales Railway Company to be by them carried from Newport to Birmingham, for the plaintiff took possession of it at Gloucester and delivered it to a servant of the defendants. In that respect also the case differs from *Scothorn v. The South Staffordshire Railway Company*. The ticket also points to the separate responsibility of each Company. *Marshall v. The York, Newcastle and Berwick Railway Company* (c) and *The Great Northern Railway Company v. Shepherd* (d) are authorities that a railway Company is liable for the loss of a passenger's goods.

1859.  
 MYTTON  
 v.  
 MIDLAND  
 RAILWAY CO.

*Phipson* (*Mellor* with him), for the defendants.—There is no decision as to what is the nature of the contract with a railway Company, which undertakes to carry *passengers* to a place beyond their own line; but it is submitted that there is no distinction in that respect between passengers and

(a) 1 H. & N. 517.

(b) 8 Exch. 341.

(c) 11 C. B. 655.

(d) 8 Exch. 30.

1859.  
 MYTTON  
 v.  
 MIDLAND  
 RAILWAY Co.

goods. The contract is made with the Company which receives the fare and gives the passenger the ticket. In the case of a refusal to carry, who is to be sued? The Company who receives the money may be the agent for the others, but there is no joint contract between them and the passenger. *Muschamp v. The Lancaster and Preston Junction Railway Company (a)* and *Wilby v. The West Cornwall Railway Company (b)* are authorities that the contract was with the South Wales Railway Company, to carry the whole distance from Newport to Birmingham. This is not like the case of several coach proprietors each of whom provided horses for the coach for a certain distance, but all shared in the profits and were therefore partners.

*Milward*, in reply.—Suppose a Company contracted to carry from London to Berlin, that could not be one contract, for there would be different regulations and conditions on different parts of the journey. So, here, the bye-laws and regulations of these Companies vary.

*Cur. adv. vult.*

MARTIN, B., now said :—This was a special case argued before us a few days ago. The material facts are these :—The plaintiff, desiring to go from Newport to Birmingham, took a ticket at the Newport Station of the South Wales Railway Company. That Company's line extends to a point within a few miles of Gloucester, where it meets the line of the Great Western Railway Company, and the defendants, the Midland Railway Company, have a line from Gloucester to Birmingham. The South Wales Railway Company had an arrangement with the Great Western Railway Company and the defendants to issue tickets

(a) 8 M. & W. 421.

(b) 2 H. & N. 703.

and convey passengers the entire distance. The plaintiff delivered his portmanteau to a porter of the South Wales Railway Company at Newport, who placed on it a ticket marked "S. W. R. viâ Midland from Gloucester, Newport to Birmingham." The plaintiff proceeded on his journey, and arrived with his portmanteau at Gloucester. He there took the portmanteau from the South Wales Railway carriage and delivered it to the guard of the Midland Railway Company. On his arrival at Birmingham the portmanteau was missing, but was ultimately found in a street in Birmingham, broken open and part of its contents gone. The plaintiff has thought fit to bring his action against the Midland Railway Company for the purpose of recovering compensation for the loss of his portmanteau; indeed he was obliged to do so if he could recover at all, because the act of parliament which incorporates the South Wales Railway Company contains a provision by which every passenger travelling on the railway is to take his luggage at his own risk; but there is no such enactment in the Midland Railway Company's Act. Upon these facts the only question is, whether there was any contract between the plaintiff and the Midland Railway Company, or whether the contract was not an entire contract with the South Wales Railway Company to convey the plaintiff the whole distance from Newport to Birmingham. We are of opinion that there was but one contract, and that that contract was with the South Wales Railway Company, and not with the Midland Railway Company. There was one sum paid and one ticket given for the entire journey, and there was no evidence whatever of any privity of the Midland Railway Company to that contract, except that, by arrangement with the South Wales Railway Company, they conveyed on their line passengers booked from Newport to Birmingham. We think that the

1859.  
  
 MYTTON  
 v.  
 MIDLAND  
 RAILWAY Co.

1859.  
 ———  
 MYTTON  
 \*  
 MIDLAND  
 RAILWAY CO.

principle of *Muschamp v. The Preston and Lancaster Railway Company* applies to this case; and as there was a contract with the Midland Railway Company the plaintiff fails in this action, and the defendants are entitled to a judgment.

Judgment for defendants (a).

(a) See *Collins v. The Bristol and Exeter Railway Company*: Dom. Proc. July 27. 1851. and Angell on Carriers, p. 451. & 452.

June 8. STURROG, Provisional Assignee of the Estate of J. HARTLY, an insolvent debtor, v. Sir W. DARELL, Baronet, Administrator, with the will annexed, of JOHN EARL of EGDMONT.

In May 1831, the obligee of a bond brought an action upon it against the obligor. After notice of trial the action abated by the death of the obligor in December 1835. The obligor left a will, which was not proved. On the 18th May, 1857, administration of the goods and effects of the obligor with his will annexed was granted to the present defendant. In

THIS was an action to recover 2000*l.* upon two bonds. By consent of the parties and order of a Judge, a case was stated for the opinion of this Court, without pleadings, (in substance) as follows:—

In January, 1821, John, afterwards Earl of Egmont, executed a bond in the penal sum of 1000*l.* conditioned for payment by him, his heirs, executors or administrators, to J. Hartly, his executors, administrators or assigns, of the sum of 500*l.* with interest at 5*l.* per cent. within twelve calendar months next after the decease of John James (then) Earl of Egmont; and a like bond in the penal sum of 1000*l.* conditioned for payment of 500*l.*, with interest, within eighteen months after the death of the said John James Earl of Egmont.

March 1853, the obligee petitioned the Insolvent Court, and his effects vested in the provisional assignee, the present plaintiff, who commenced this action on the bond against the defendant on the 17th May, 1858.—*Held*, that the right of action was not barred by the Statute of Limitations, 3 & 4 Wm. 4, c. 42, s. 3.

John James, Earl of Egmont, died in February, 1822, and the said John then became Earl of Egmont.

On the 24th May, 1831, J. Hartly commenced an action upon the said bonds against John Earl of Egmont. (The case then stated that J. Hartly declared in the action; that the Earl of Egmont pleaded; that issue was joined and notice of trial given; and that afterwards two attempts were made to settle all questions between the parties by arbitration, which proved abortive, and on the 30th October, 1835, J. Hartly gave notice of his intention to proceed in the action.)

John Earl of Egmont died on the 31st December, 1835, and the said action thereby abated. By his will, dated the 4th April, 1824, he appointed his son Henry, who succeeded him as Earl of Egmont, his sole executor. The said Henry Earl of Egmont never proved the will, and died in December 1841. By his will, dated the 11th December, 1841, he devised and bequeathed all his real and personal estate to Sir E. Tierney absolutely, and appointed the said Sir E. Tierney his sole executor. His will was, on the 7th January, 1843, duly proved in the Prerogative Court in Ireland by the said Sir E. Tierney; but not in England. Sir E. Tierney, by his will, dated the 28th April, 1855, and certain codicils thereto, devised his real estates, and gave the residue of his personal estate to his daughter, the wife of Sir W. Darell, the present defendant, and appointed his daughter and the defendant executrix and executor of his will.

Sir E. Tierney died on the 11th May 1856, and his will and the codicils thereto were proved by the defendant in the Prerogative Court of Canterbury on the 21st July, 1856. On the 16th May, 1857, administration of all and singular the goods, chattels, and which were of the said Henry Earl of Egmont at the time of his death, with the

1859.

STURGIS

v.

DARELL

1859.  
 STURGIS  
 v.  
 DARELL.

will of the said Henry Earl of Egmont annexed, were granted to the defendant by the Prerogative Court of Canterbury.

On the 18th May, 1857, administration of all and singular the goods, chattels, and credits which were of the said John Earl of Egmont at the time of his death, with the will of the said John Earl of Egmont annexed, was granted to the defendant by the same Court.

In the year 1852, the said J. Hartly, being a prisoner for debt, petitioned the Court for the relief of Insolvent Debtors in England under 1 & 2 Vict. c. 110, and, by an order of that Court, dated the 31st March, 1852, all his estate and effects became vested in the provisional assignee, the present plaintiff.

The writ in this action issued on the 17th May, 1858.

It is agreed that the Court shall be at liberty to draw all such inferences of fact as a jury ought to or might have drawn.

The question for the opinion of the Court is whether the plaintiff's right of action is or is not, under the said circumstances, barred by the 3 & 4 Wm. 4, c. 42, s. 3. If the Court shall be of opinion that the action is not barred by the said statute, judgment shall be given for the plaintiff. If the Court shall be of opinion that the action is barred by the said statute, judgment shall be entered for the defendant.

*H. Mills* argued for the plaintiff (June 1).—The action against John Earl of Egmont abated by his death; and there never was any one who could be sued until the defendant obtained administration of his effects; and within twelve months from that time this action was commenced. *Curlewis v. The Earl of Mornington* (a) is an express autho-

(a) 7 E. & B. 283; affirmed in the Exchequer Chamber, June 15, 1858.

rity, that if an action on a simple contract is commenced within six years, and abates by the death of the defendant, the plaintiff may bring a fresh action against his administrator, provided he does so within a reasonable time after the grant of administration. There *Williams, J.*, thought that the case might fall within the old law as to journeys accounts (*a*). The 21 Jac. 1, c. 16, s. 3, prescribes a certain period within which actions must be brought on contracts, without specialty. The 4th section introduces three exceptions, viz., where judgment for the plaintiff is reversed by error; where, on motion in arrest of judgment, the judgment is given against the plaintiff; and where the defendant, being outlawed, reverses his outlawry; in such cases the plaintiff may commence a new action within a year after judgment reversed, or judgment given against the plaintiff, or outlawry reversed. The Courts have also held that certain cases are within the equity of the 4th section, as where an action commenced within six years abates by the death of the plaintiff: *Kinsey v. Heyward* (*b*); where an action is commenced in an inferior Court within the six years, and is removed by the defendant to a Superior Court: *Matthews v. Phillips* (*c*); and where a feme sole commences an action within the six years and, pending the suit, marries: *Lord Middleton v. Forbes* (*d*). [*Watson, B.*, referred to *Murray v. The East India Company* (*e*).] In that case the bill of exchange was not accepted until after the death of the testator, and therefore, until administration was granted to the plaintiff, there was no person capable of suing. The 7th section of the 21 Jac. 1, c. 16, introduces a further exception in the case of disabilities of plaintiffs; the 4 Anne, c. 16, s. 19, extended that provision to dis-

1859.

STURGIS  
v.  
DARELL

(*a*) See *Davies* dem., *Lowndes* ten., 7 Man. & G. 762.

(*b*) 1 Ld. Raym. 432.

(*c*) 2 Salk. 424.

(*d*) Willes, 259, note.

(*e*) 5 B. & Ald. 204.

1859.  
 STURGIS  
 v.  
 DARELL.

abilities of defendants. The 3 & 4 Wm. 4, c. 42, which limits the time for bringing actions on specialties, is in pari materi with the 21 Jac. 1, c. 16, and ought to receive the same construction. The 3rd section of the 3 & 4 Wm. 4, c. 42, corresponds with the 3rd section of the 21 Jac. 1, c. 16; and the 6th section of the 3 & 4 Wm. 4, c. 42, contains verbatim the same exceptions as the 4th section of the 21 Jac. 1, c. 16. The 4th section of the 3 & 4 Wm. 4, c. 42, embodies the provisions both of the 7th section of the statute of James and the 19th section of the statute of Anne. *Rhodes v. Smethurst* (a) is distinguishable on the ground adverted to by Lord Campbell in *Curlewis v. Lord Mornington* (b), viz., that the original action was not commenced within the six years.

*Skinner* (R. E. Turner with him), for the defendant.—The 21 Jac. 1, c. 16, has been construed with reference to some supposed equity—a construction which would not be put upon it at the present day. There are certain recognised rules for the construction of acts of parliament, consistently with which the 3 & 4 Wm. 4, c. 42, cannot receive an equitable construction. In *Gwynne v. Burrell* (c) Coleridge, J., said: “I cannot concede that we are at liberty, upon any ground whatever, to add a new term to the statute. In saying this I am not unmindful of the dicta to be found in our books, nor of decisions upon old statutes, which seem to warrant a more free dealing with the written law; and whenever acts of parliament shall again be framed with the generality and conciseness with which the legislature spoke some centuries since, it may be fit to consider the soundness of that principle of interpretation which they involve; but it is enough to say that it is wholly

(a) 4 M. & W. 42; affirmed in  
 Exch. Ch., 6 M. & W. 351.

(b) 7 E. & B. 291.

(c) 1 Scott, N. S. 711. 739.

inapplicable to a modern statute in which the legislature is careful to express all it intends in so many words that to go beyond their necessary implication is to make, not to interpret, law." The 21 Jac. 1, c. 16, and 3 & 4 Wm. 4, c. 42, are not in *pari materiâ*, as the one relates to simple contracts, the other to specialties. The 3 & 4 Wm. 4, c. 42, s. 3, includes actions for penalties, and therefore the law as to specialties must apply to penalties; for it would be unreasonable to put a different interpretation on different parts of the same section; but penal statutes are strictly construed: *Adam v. The Inhabitants of Bristol* (a). [*Pollock*, C. B.—There may be a wide difference between the construction give to a statute which limits a new right, and a statute which limits a right which already exists. In the case of an action against the inhabitants of a city to recover damages, as to which there was no common law right, unless the plaintiff brings himself within the words of the statute creating the right he cannot sue.] *Rhodes v. Smethurst* (b) is an authority that if the statute has once begun to run, it will continue to run, notwithstanding there is no person who can be sued. In *Bradling v. Barrington* (c) Lord *Tenterden* observed "that there is always danger in giving effect to what is called the equity of a statute, and that it is much safer and better to rely on and abide by the plain words, although the legislature might possibly have provided for other cases had their attention been directed to them." In *Curlewis v. The Earl of Mornington* the judgment of the Court of Exchequer Chamber proceeded on the ground that the case was concluded by the construction already put on the 21 Jac. 1, c. 16. Besides, the 6th section of the 3 & 4 Wm. 4, c. 42, only gives the right to bring a new action to the "plaintiff, his executors or administrators."

1859.

STURGIS

v.  
DARELL.

(a) 2 A. &amp; E. 389.

Exch. Ch., 6 M. &amp; W. 351.

(b) 4 M. &amp; W. 42; affirmed in

(c) 6 B. &amp; C. 467. 475.

1859.  
 STURGIS  
 v.  
 DARELL.

Here there has been a change of both parties, and there is no identity of interest, as in the case of executors, for the plaintiff is the assignee of the insolvent obligor, and therefore a mere stranger.—He also referred to *Howcutt v. Bonser* (a).

*H. Mills*, in reply, referred to *Spencer's Case* (b); Com. Dig. "Abatement" (P.).

*Cur. adv. vult.*

BRAMWELL, B., now said:—This was an action on a bond by the assignee of the obligee, who had taken the benefit of the Insolvent Debtors' Act, and the question was, whether, under the circumstances stated in a special case, the right of action was barred by the Statute of Limitations. On the 24th May, 1831, the obligee commenced an action on the bond against the obligor, and issue was joined and notice of trial given in that action; but it abated by the death of the obligor on the 31st December, 1835. He left a will, which was not proved by the executor named therein, and there was no person who could be sued until the 18th May, 1857, when administration of the obligor's effects, with his will annexed, was granted to the defendant. Within a year afterwards, viz. on the 17th May, 1858, the present action was commenced.

In the course of the argument it was suggested that the case might fall within the old law as to journeys accounts; but a little consideration will shew that cannot be so, because a proceeding by journeys accounts is in truth the same action continued. Here, indeed, the action abated by the death of the defendant; but if it had not, upon the insolvency of the plaintiff the defendant might have pleaded in bar that the cause of action had vested in the plaintiff's assignee; and it seems to me impossible to say that this is

(a) 3 Exch. 491. 500.

(b) 6 Rep. 9 b. 11 a.

a continuation of an action to which such a plea would have been a good plea in bar. That being so, the principle of the proceeding by journeys accounts is inapplicable. I notice this in order that it may not be supposed that we have overlooked or treated with indifference the observations of *Williams J.* in *Curlewis v. Lord Mornington*, where he says that the judgment in that case might be justified on the ground that the proceeding by journeys accounts applied.

The question therefore is, whether, upon the facts stated, the plaintiff is entitled to recover. Now there are very cogent considerations both ways. The modern rule is that statutes must be construed according to their plain and natural meaning, neither adding to or subtracting from them; and if we were now called upon for the first time to construe the 21 Jac. 1, c. 16, there would be difficulty in putting an equitable construction upon the 4th section, and saying that a case like that of *Curlewis v. Lord Mornington* was within the equity of the statute. On the other hand, the 21 Jac. 1, c. 16, has for many years been so construed. The 3 & 4 Wm. 4, c. 42, is certainly in *pari materiâ* with that Act, and had it been framed in this way,—that all the provisions of the statute of James shall extend to actions on specialties, with this difference, that such actions shall be brought within twenty years of the cause of action instead of six years, it could scarcely have been said that the construction put upon the statute of James did not apply to cases arising under the statute of William. It seems to us that these considerations are almost of equal value. On the one hand it may be said to be strange that the legislature, which must be taken to have known how the 21 Jac. 1, c. 16, has been construed, if they did not intend the 3 & 4 Wm. 4, c. 42, to receive a similar construction, should not have said so. On the

1859.

STURGIS  
v.  
DARELL

1859.

STURGIS  
v.  
DARELL.

other hand it may appear strange that, if the legislature intended the same construction to be put on the statute of William which had been put on the statute of James, they did not insert a provision to that effect. The arguments on the one side and on the other are of almost equal weight. There is, however, one consideration which induces us to think that we ought to give judgment for the plaintiff, and that is this—the great hardship and unreasonableness of holding that time runs against a person who can do nothing to prevent it, and saying that though there is no person in existence whom he can sue, yet because the statute has run for a day or a month, during which there was a person whom he sued, it still continues to run. Possibly the legislature might say, “We have deliberately considered that, and we think upon the whole it is advisable to apply the general principle, although it may work hardship in particular cases.” They have not, however, said so in words, and the consideration that there has been a uniform course of decisions upon the earlier statute for nearly two hundred years makes us think that, if this matter is to be otherwise determined, it should be so in a Court of error. Our judgment is therefore for the plaintiff.

Judgment for the plaintiff.

---

1859.

## GOODWYN v. CHEVELEY.

June 14.

**TRESPASS** for seizing, taking and impounding certain bullocks of the plaintiff.


Plea (inter alia).—That the defendant was possessed of a certain close, situate in the county of Essex, and because the said bullocks were wrongfully in his said close doing damage therein, he, the defendant, seized and took the said bullocks as a distress for the said damage, and drove them out of the said close to a pound in the county aforesaid, where he impounded them, &c.

Replication.—That, before and at the said time when, &c., the close in the plea mentioned did lie, and still does lie, contiguous and next adjoining to a certain common and public Queen's highway; that the fence between the close of the defendant and the said highway, before and at the said time when, &c. was ruinous and out of repair; and that, by reason of the fence being so ruinous and out of repair, the said bullocks then being lawfully passing and being driven along the said highway, without the knowledge of the plaintiff, and against his will, and without any negligence on the part of himself or his servants, escaped into the close of the defendant, and were there seized and taken by the defendant before the plaintiff had any notice of their

Where cattle passing along a public highway stray into an adjoining field, through defect of fences, the owner of the cattle is bound to remove them within a reasonable time; and what is a reasonable time is not to be determined by the Judge, but is a question for the jury, with reference to all the surrounding circumstances. (Per *Pollock*, C. B., *Martin*, B., and *Channell*, B. *Bramwell*, B., dissentiente.)

In the month of November, between five and six o'clock in the evening, the plaintiff's drovers were driving thirty-six bullocks along a public highway, when thirteen of

them strayed into the defendant's field through a gap in the fence. The drovers left them in the field and drove the other twenty-three to the nearest public-house, where they lodged them for the night. In about an hour the drovers returned to the field for the thirteen, but in the mean time the defendant had impounded them. There was nothing to prevent the drovers from immediately driving them out of the field except that they wished to take care of the others. The plaintiff having brought an action of trespass against the defendant for impounding his bullocks, the learned Judge ruled that as the drovers did not at once proceed to drive the bullocks out of the defendant's field, but left them there while they took the others to a place of safety, they did not remove them in a reasonable time, and directed a verdict for the defendant.—*Held*, a misdirection. (Per *Pollock*, C. B., *Martin*, B., and *Channell*, B. *Bramwell*, B., dissentiente.)

1859.  
  
 GOODWYN  
 v.  
 CHEVELEY.

so being in the close of the defendant, and before the plaintiff could drive them out.

Rejoinder.—That, before the committing of the trespasses and grievances in the declaration mentioned, and whilst the said bullocks were wrongfully in and upon the said close, the plaintiff, his servants and agents, in that behalf, had knowledge and notice that the said bullocks were so in the said close as aforesaid. And the defendant further says that a reasonable time for the plaintiff, his servants and agents, to drive, and during which they might and ought to have driven, the said bullocks out of the said close, elapsed after the plaintiff, his servants and agents, had such knowledge and notice as aforesaid, and before the committing of the said trespasses and grievances, but the said bullocks were not driven out of the said close, but remained therein until the committing of the said trespasses and grievances by the neglect of the plaintiff, his servants and agents, in that behalf, and without any fault of the defendant.

Issue thereon.

At the trial, before *Bramwell*, B., at the Essex Summer Assizes, 1858, the following facts appeared:—The plaintiff was a cattle dealer, and about half past five o'clock in the evening of the 12th of November his drover, assisted by another man, was driving thirty-six bullocks along the highway from Widford to South Weald, when thirteen of the bullocks strayed into the defendant's field through a gap in the fence. The drover left them in the field, and drove the other twenty-three bullocks to the nearest public house, where he lodged them for the night. In about an hour he returned to the defendant's field for the thirteen bullocks, but in the mean time the defendant had taken and impounded them. The drover, who was a witness, stated that nothing else prevented him from immediately getting the thirteen bullocks out of the defendant's field

except that while he was looking after them he might have lost the twenty-three.

It was submitted, on behalf of the defendant, that the plaintiff had not removed his cattle from the defendant's field within a reasonable time, and therefore the defendant was justified in impounding them. The learned Judge told the jury that, as the plaintiff's servant stated and the fact was, instead of at once proceeding to drive the thirteen bullocks out of the defendant's field, he left them there while he drove the others to a place of safety, he did not remove them within a reasonable time; and, under his Lordship's direction, the jury found a verdict for the defendant.

*Lush*, in last Michaelmas Term, obtained a rule nisi for a new trial on the ground of misdirection; against which

*Hawkins* and *R. E. Turner* shewed cause in last Easter Term (April 21, 28).—The ruling of the learned Judge was correct. The plaintiff was bound to remove his cattle from the defendant's field within a reasonable time, that is, within such time as they could have been driven out, and there was evidence that they might have been removed sooner than they were. [*Pollock*, C. B.—A "reasonable time" means as soon as circumstances will permit.] The drovers ought not to have left the cattle in the field while they drove the others to a place of safety. [*Pollock*, C. B.—The cattle got into his field through the plaintiff's neglect to keep up his fences, and he has no right to require the drovers to neglect their duty in taking care of the other cattle.] There was nothing to prevent the men from immediately driving the cattle out of the field, but instead of doing so they wait an unreasonable time. [*Pollock*, C. B.—If the other cattle had been left in the road a person

1859.

GOODWYN  
v.  
CHEVELEY.

1859.  
 ~~~~~  
 GOODWYN  
 v.  
 CHEVELEY.


driving in the dark might have driven over them. *Bramwell*, B.—Suppose a person gives an order to a tailor to make him a coat, and at the end of a week the tailor says that he has large orders and cannot finish it for six months.] That would of itself be an unreasonable time to wait, without reference to extrinsic circumstances. It was a trespass to allow the cattle to remain in the defendant's field after notice: 2 Wms. Saund. 285 *b*, note 4. [*Pollock*, C. B.—Suppose a dense fog had come on, or an accident had happened to the drover. What is a reasonable time must depend on the circumstances of each particular case.]

*Honyman*, in support of the rule.—A “reasonable time” means the time within which the cattle might have been driven out of the field, with reference to the surrounding circumstances. The defendant is in one sense a wrongdoer, since the cattle got into the field through his neglect to keep up his fences. [*Bramwell*, B.—A person is not bound to fence his land. *Pollock*, C. B.—On the one hand he is not bound to fence; on the other, the owner of the cattle is not a trespasser until he refuses to remove them within a reasonable time after notice.] A contract by a manufacturer to furnish certain specified goods “as soon as possible” means “within a reasonable time,” regard being had to the manufacturer's ability to produce them and the orders he may already have in hand: *Attwood v. Emery* (a). What is a reasonable time may, in some cases, be a question for the Judge, as in the case of notice of dishonour of a bill of exchange; but where the question depends on a variety of circumstances it ought to be left to the jury: *Facey v. Hudson* (b). In an action against an overseer, under the 17 Geo. 2, c. 3, s. 3, for not giving to an inhabitant of the

(a) 1 C. B. N. S. 110.

(b) 3 B. & C. 213.

township, as directed by section 2, a copy of a rate "forthwith" upon demand and offer of payment, it was held that it was the Judge's duty to tell the jury, as a direction in point of law on the facts proved, that the copy was or was not given forthwith, but that he was right in leaving it to them to say whether, under the circumstances, it had or had not been given in reasonable time, and therefore, according to reasonable construction, "forthwith:" *Tennant v. Bell* (a). [Channell, B.—In *Mullick v. Radakissen* (b) it was held that a bill of exchange must be presented in a reasonable time, with reference to the interest of the drawer to put the bill into circulation, or the interest of the drawee to have the bill speedily presented, and that what constitutes a reasonable time is a mixed question of law and fact for the determination of the Court and the jury.] *Phillips v. Irving* (c) decided that, in a policy on a seeking ship, a detention for a reasonable time for the purposes of the seeking adventure must be allowed; and whether the time is reasonable is to be determined by the state of things at the port where the ship happens to be. *Burton v. Griffiths* (d) and *Temple v. Pullen* (e) are also authorities that what is a reasonable time is a question for the jury.—He also referred to 1 Taylor on Evidence, p. 36, 3rd ed.

1859.  
  
 GOODWYN  
 v.  
 CHEVELEY.

*Cur. adv. vult.*

BRAMWELL, B., now said:—In this case, which was tried before me, we are not all agreed. I have the misfortune to be alone in the opinion I entertain—an opinion which I expressed at the trial and which I now abide by. But in

(a) 9 Q. B. 684.

(b) 9 Moo. P. C. 46.

(c) 7 Man. & G. 325.

(d) 11 M. & W. 817.

(e) 8 Exch. 389.

1859.  
—  
GOODWYN  
v.  
CHEVELEY.

order to render the judgment which I am about to deliver more intelligible, I will shortly state what the question was. The plaintiff complained that the defendant took and impounded his cattle. The defendant pleaded that he took them damage feasant in his close. The plaintiff replied that the cattle were passing along a highway, and that they escaped into the close in consequence of the fence being out of repair. The defendant rejoined that after the plaintiff had notice that the cattle were in the close, a reasonable time elapsed during which they might and ought to have been driven out, but were not. Upon that the plaintiff took issue. At the trial it appeared that the plaintiff's drover, assisted by another man, was driving thirty-six oxen along a highway. It was dark, and there was a gap in the fence of the defendant's field, who was not shewn to have been under any obligation to fence, and through this gap thirteen of the cattle strayed into the field. The plaintiff's men, thinking it better to leave them safely where they were than to leave the other cattle in the road unprotected, drove the latter on to the nearest house where they lodged them for the night, and with all convenient speed returned to the defendant's field. When they arrived there, the cattle which had strayed into it had been taken and impounded. The drover, who was a witness, said: "That there was nothing to prevent him driving the cattle off the defendant's field, except that he preferred taking care of those which had not escaped." It was about an hour between the time when the cattle got into the defendant's field and the plaintiff's men were enabled to come back to take them away. It is not necessary, however, to be particular as to the time, because it was admitted by the plaintiff's men that they could, had they thought fit, have got the cattle out of the defendant's close before they were

impounded. Upon these facts I ruled that it appeared upon the plaintiff's case, and was indeed admitted, that his men had not removed or tried to remove the cattle within a reasonable time, and consequently that the defendant had not impounded them before a reasonable time for their being removed had elapsed. Accordingly I directed a verdict for the defendant, and my ruling has been questioned by a motion for a new trial on the ground of misdirection. I now propose to shew why I think that ruling was correct.

1859.  
 ~~~~~  
 GOODWYN  
 v.  
 CHEVELEY.

In cases of this description there is always some confusion as to how far the question is one of law or of fact. In my opinion these cases raise two questions; first, what is the rule of law to determine what is or is not a reasonable time; secondly, whether the facts are within that rule? I do not know a better illustration than that mentioned in the course of the argument. A person gives a tailor an order for a coat. The coat is brought home at the end of six months. The person who ordered it refuses to take it, upon which an action is brought; and the question is, whether the coat was tendered within a reasonable time. We will suppose the plaintiff to admit that the ordinary time within which a coat is made and delivered is a week or ten days, at all events that six months is a great deal longer than the ordinary time. In such a case I am clearly of opinion that the Judge might direct a verdict for the defendant. He might say to the jury, "The law is that a tradesman is bound, in a case of this kind, to deliver or tender the article within a reasonable time; and a reasonable time, in the absence of anything to controul the particular contract, is the ordinary time. That being the law, and it being admitted by the plaintiff that he did not deliver the coat within that time, you must find your

1859.  
—  
GOODWYN  
v.  
CHEVELEY.

verdict for the defendant." So here, it seems to me (as I held at the trial and still think), that a reasonable time means a reasonable time to do the act without reference to extrinsic circumstances; and that, as it was admitted that the act could have been done within that time, but longer time was taken because extrinsic circumstances made it desirable, I was right in directing a verdict for the defendant. No doubt there are cases in which the question must be left to the jury. For instance—to put again the case of the coat—suppose some witnesses stated that the usual time to deliver a coat is a week, and others said it is a month, the Judge could only say to the jury, "I rule that it ought to be delivered within a reasonable time; and it is for you to determine what that time is." But it seems to me that, where it is admitted that the time exceeds that which is by law a reasonable time, the Judge is not only warranted but is bound to direct a verdict for the defendant, in the same way as he would be bound to direct a verdict for the plaintiff if the coat had been delivered in the ordinary time.

Then was I right in holding that a "reasonable time" means a reasonable time to do the act without reference to extrinsic circumstances? I think I was, and I will proceed to shew why. The plaintiff was not justified in allowing his cattle to trespass on the defendant's land. He had a right to take his cattle along the highway; and, when cattle are driven along a highway, if there are no fences to the adjoining land it is certain that the cattle will stray. That is an unvoidable injury which persons whose lands border on a highway must sustain. But the immunity of the plaintiff extends no further than necessity requires; and, as there was no necessity for his cattle remaining on the defendant's land any longer than the time required to drive them off, it seems to me manifest that they remained there an unrea-

sonable time, and consequently that the defendant did not distrain them before a reasonable time for their removal had elapsed. The fallacy of the argument on the other side is in considering the question of reasonableness with reference to the situation of the plaintiff. I admit that, if the plaintiff had complained of his men for leaving the cattle in the defendant's field instead of at once driving them out, and had said, "Your behaviour was not reasonable behaviour," they, as his servants, would have had an excellent answer, because they would have been at liberty to say, "It was the best thing we could do for you." But here, the question is not what was the best thing they could do for the plaintiff, but what was the best thing they could do for the defendant upon whose land the plaintiff's cattle had trespassed. In like manner, it may be that the public would approve of the conduct of the drovers in leaving the cattle safely browsing upon the defendant's pasture while they took the others to a place of security, rather than leave them unprotected in the road to wander about and possibly do mischief. But it is the case of the defendant that is to be considered, not that of the public. If the question was whether the drovers ought to be punished for what they did, I should say they ought not. But the question is, what is the defendant's right in the matter? His right is to have his land trespassed upon as little as possible; that is, to no greater extent than is absolutely unavoidable. I therefore think that a reasonable time was such as, and no more than was required for the act of driving the cattle out of the field. The case was argued as though there had been some hardship on the plaintiff in having his cattle distrained and impounded, but there is none. Was the defendant to have his crops grazed upon until the plaintiff could get a convenient time to remove the cattle? If so, they might have continued in the defendant's field for twenty-four

1859.  
GOODWYN  
v.  
CHEVELEY.

1859.  
—  
GOODWYN  
v.  
CHEVELEY.

hours because the drovers could not sooner have housed the other cattle. If the question be whether the defendant's herbage is to be grazed upon by the plaintiff's cattle without any compensation, until it is convenient for the drovers to remove them, or whether the plaintiff is to be subjected to the inconvenience of getting his cattle out of the pound; it seems to me that the plaintiff ought to bear the loss, for he had no right to have his cattle in the defendant's field, and his immunity from the consequence of his cattle having trespassed on the defendant's land only extended so far as was necessary, and there was no physical impossibility in their being immediately driven out. Another consideration will shew the hardship on the defendant. He finds cattle grazing in his field: he has no notice that they will be taken away, nor is there anything to indicate whether he may or may not impound them. How long is he to let them remain? What is he to do? Is he to inquire of everyone he meets whether he has seen any persons driving other cattle along the road with the appearance of an intention to return and remove the cattle from his field? He can do nothing but impound them. For these reasons I think that my ruling was right. At the trial I thought it a clear case, and I think so now. I am sorry to differ from the rest of the Court, but this being my opinion I am bound to express it.

MARTIN, B.—In my opinion this point is essentially a question for the jury, and not a question for the Judge. It is said that the defendant was not to blame: I do not say he was. I am not aware that he could be indicted for not fencing his field from the road, as most people in this country do. But if a person will neglect to fence he must put up with the inconveniences consequent upon it; and one is, that cattle being driven along the road will occa-

sionally stray. It seems to me that the plaintiff's man did all that he could be reasonably required to do. I think he was under no obligation to leave the rest of his master's cattle to stray at nightfall upon the road, for the purpose of relieving the defendant from the consequence of his neglect to fence his field. However, all I say is that this is a question for the jury, and not a question as to which a Judge can take upon himself to direct absolutely a verdict one way or the other.

POLLOCK, C. B.—I think that the rule ought to be absolute. My brother *Bramwell's* direction was in substance this,—that if more time was taken to remove the cattle from the defendant's field than was reasonably necessary for that purpose, and for that purpose only, without reference to extrinsic circumstances, then the cattle were not removed within a reasonable time, and the defendant had a right to distrain them. In my opinion that is not the law. It certainly is not, according to any authority which has been cited. The question is, whether the owner of land adjoining a highway, who neglects to fence it against the encroachments of cattle passing along the highway, is entitled to require the drovers (whom on this occasion I will assume were the proper number) to remove the cattle which have strayed on his land, without reference to any other consideration whatever. If the cattle remaining in the highway had injured any person so that he was in peril of his life, or if a sheriff called on the drovers in the Queen's name to arrest a felon in the field, or to prevent a breach of the peace, these and similar circumstances, it is suggested, are to have no weight whatever, and the owner of the land has a right to the instant attention of the drovers, in neglect of every other, even a public duty, to remove from his land the cattle which he might

1859.

GOODWYN  
v.  
CHEVELEY.

1859.  
 ~~~~~  
 GOODWYN  
 v.  
 CHEVELEY.

have excluded, if he had taken the ordinary means of fencing it from the highway. I think that the owner of land adjoining a highway, upon whose property cattle have strayed, has a right to have them removed within a reasonable time with reference to all the circumstances of the transaction at the time of its occurrence; and that, inasmuch as cattle on a highway require some care, both as regards the public and the cattle themselves, especially at night, it seems to me that in a case of this kind, if the cattle on the highway can be taken to a place of safety within a reasonable time, the drovers may do so and return to drive off the land those which have strayed. Whether the time is reasonable may be fairly submitted to the jury. If the cattle on the highway cannot be put in a place of safety for many hours, it may be a question for the jury whether the cattle in the field ought not to be removed more immediately. Here, the jury have not had it submitted to them whether, with reference to all the circumstances, a reasonable time elapsed without the cattle being removed from the defendant's field. I therefore think that there ought to be a new trial. My brother *Channell* is of the same opinion.

Rule absolute (a).

(a) The cause came on again the Essex Summer Assizes, 1859, for trial before *Blackburn, J.*, at when a juror was withdrawn.



1859.

HORTON v. WILLIAM SAYER, Executor of the last Will and  
Testament of EDWARD SAYER.

June 8.

**D**ECLARATION, by assignee of the reversion, on an indenture of lease, whereby one John Stokes demised to the defendant's testator a coal mine for a term of sixty years, from the 8th of February, 1842, at a certain yearly rent or royalty; and the defendant's testator covenanted to raise annually 4000 tons of coal.—Breach: that the defendant's testator did not annually raise 4000 tons of coal.

Plea.—That it was agreed by and between the parties to the above mentioned indenture of lease, that if at any time or times during the said term thereby granted and demised, or intended so to be, or at or after the expiration or other sooner determination thereof, any difference, variance, controversy or doubt, or question should arise, happen or be raised between the said parties thereto, or their respective heirs, executors, administrators or assigns, or other representatives, touching or concerning any covenant, clause, proviso, word, matter or thing in the said indenture expressed or contained, or the meaning or construction thereof, then and in such case, and so often as the same should happen, all and every the matters in difference, variance, controversy, doubt or question, should be discussed, resolved, and finally settled, ended and determined by two indifferent persons, or arbitrators, and one of the said arbitrators should be nominated and chosen by the

To an action for a breach of covenant contained in an indenture of lease, the defendant pleaded that it was agreed by and between the parties to the indenture, that if any difference, variance, controversy, doubt, or question should arise between the parties, touching or concerning any covenant, clause, proviso, matter or thing in the said indenture contained, then all and every such matter in difference should be discussed, resolved and finally ended by arbitrators chosen as therein provided: that the parties to the said indenture should not prosecute any suit, or seek any remedy either

in law or equity for relief in the premises without first submitting to such arbitration and reference.—Averments: that the plaintiff's claim, and the defendant's defence thereto, was a matter in difference which arose touching and concerning the covenants in the said indenture, and that the defendant was ready and willing to submit the same to arbitration, and had done all things necessary to entitle him to have the same submitted:—*Held*, that the plea was bad, since the covenant was an absolute agreement to oust the superior Courts of their jurisdiction, and therefore void.

1859.

HORTON  
v.  
SAYERS.

said John Stokes, his heirs, executors or administrators, and the other of the said arbitrators should be nominated and chosen by the said Edward Sayer, his executors, administrators or assigns, within two calendar months next after any such difference, variance, controversy, doubt or question should arise, happen or be moved as aforesaid; and in case either party should receive from the other party notice in writing, under his or their hand or hands, to nominate and choose a person as an arbitrator for the purposes aforesaid, and should neglect or refuse for the space of two calendar months after such notice should have been received to nominate and choose a person as an arbitrator, then and in such case, and so often as the same should happen, it should be lawful for the other party, at the expiration of said last mentioned two calendar months, to nominate and choose both the persons to be arbitrators for the purposes aforesaid, and in case the two persons to be nominated and chosen to be such arbitrators by any of the means aforesaid cannot finally agree in opinion in regard to the matters to be referred to them from time to time, within one calendar month next after the same should be so referred to them, then and in every such case the same should be discussed and finally settled, ended and determined by such one indifferent person as the said two arbitrators for the time being should for that purpose from time to time nominate and appoint as umpire in the same matters, who should finally end and determine the same within one calendar month next after the matter in dispute should be referred to him as such umpire, and such umpire should be named and appointed before the two arbitrators should proceed to consider the matter referred to them, and whatsoever award, order, or determination the said two arbitrators, or the said umpire, within the respective times aforesaid, should make of or concerning the matter so to be referred to them or him as aforesaid between the parties in difference, variance,

controversy, doubt or question, he the said John Stokes, for himself, his heirs, executors and administrators, covenanted, promised and agreed with and to the said E. Sayer, his executors, administrators and assigns, to stand to, obey, perform, and keep; and he the said E. Sayer, for himself, his executors, administrators and assigns, covenanted, promised and agreed with and to the said John Stokes, his heirs, executors, administrators and assigns, to stand to, obey, perform and keep. And it was further agreed and declared by and between the parties to the aforesaid indenture, that every such award, order, or determination should be binding and conclusive to all intents and purposes upon the said parties thereto and each of them, their and each of their heirs, executors, administrators and assigns, or other representatives, so as to preclude all further difference, variance, controversy, doubt or question in or about the matters lastly aforesaid; and it was thereby further declared and agreed by and between the parties to the said indenture, that the several submissions to such award, order, or determination to be made by the said arbitrators or umpire as aforesaid, should be made a rule of her Majesty's Court of Queen's Bench at Westminster, if the parties to the said indenture, or either of them, their or either of their heirs, executors, administrators or assigns, or other representatives should require it, and the justices for the time being of the said Court should think fit so to do; and that the parties thereto, or any or either of them, their or any or either of their heirs, executors, administrators and assigns, or other representatives, should not commence or prosecute any action or suit, or seek any remedy either in law or equity for relief in the premises without first submitting to such arbitration and reference as aforesaid all matters in difference, variance, controversy, doubt, or question, according to the true intent and meaning of the said indenture. And

1859.

HORTON  
v.  
SAYERS.

1859.

HORTON

v.

SAYERS.

the defendant says that the plaintiff's claim in this action and the defendant's answer and defence thereto always from the time of the arising thereof was and is a difference and matter in difference which arose between the plaintiff and defendant before this suit, touching and concerning the said covenant in the said indenture contained, and a matter so agreed to be referred to arbitration, and the determination of which always from time of the arising thereof depended, and still depends, on the meaning or construction of divers of the covenants, clauses and things in the said indenture contained; and the defendant says that he was always ready and willing to have the said difference and matter in difference submitted to such arbitration and reference as aforesaid from the time when the same so arose to the commencement of this suit, and still is so; and that, after the same so arose, and before the commencement of this suit, to wit, on the 7th March, 1859, he gave notice in writing under his hand to the plaintiff of such his readiness and willingness, and that he nominated, as in fact he did nominate and choose, one Henry Beckett, a fit person in that behalf as an arbitrator, on the part of him the defendant, to determine the said difference and matters in difference according to the said agreement, and required the plaintiff to nominate and choose an arbitrator on his part for the like purpose. And the defendant says that he has always done all things necessary to entitle him to have the said difference and matter in difference submitted to such arbitration and reference as aforesaid; and that the plaintiff commenced this action within two calendar months after the plaintiff received the said notice to nominate and choose a person as an arbitrator as aforesaid, and while the said difference and matter in difference ought to have been and before it had been submitted to such arbitration and reference as aforesaid.

Demurrer, and joinder therein.

*Dowdeswell*, in support of the demurrer.—It is an established principle that an agreement to refer matters in dispute to arbitration does not oust the Courts of their jurisdiction: *Kill v. Hollister* (a), *Thompson v. Charnock* (b), *Tattersale v. Groote* (c), and *Watson on Arbitration*, p. 10, 3rd ed. That principle was recognised by the House of Lords in *Scott v. Avery* (d), where this distinction was drawn, that any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant. In the course of the argument of *Scott v. Avery* (e) in the Court of Exchequer, *Parke, B.*, referred to Co. Litt. 53 b, where it is said: "If a man make a lease for life, and by deed grant that if any waste or destruction be done, that it shall be redressed by neighbours and not by suit or plea, notwithstanding, an action of waste shall lie, for the place wasted cannot be recovered without a plea." And *Martin, B.*, explained the principle by reference to this passage in *Sheppard's Touchstone*, p. 373, "When the condition of an obligation in the matter of it is repugnant to the obligation itself, there the condition is void and the obligation good." The judgment of the Court of Exchequer in *Scott v. Avery* (e) was reversed on the ground that the agreement did not oust the Court of its jurisdiction, since it did not deprive the plaintiff of his right to sue, but only rendered it a condition precedent that the amount to be recovered should be first ascertained by a committee or arbitrators. This is not the case of a covenant for the breach of which the covenantor is to pay such a sum as an arbitrator shall award as the amount of damage, but it is a covenant to refer to arbitration a cause of action

1859.

HORTON

v.

SAYERS.

(a) 1 Wils. 129.

(b) 8 T. R. 139.

(c) 2 Bos. &amp; P. 131.

(d) 5 H. L. Cas. 811.

(e) 8 Exch. 487. 497.

1859.

HORTON

v.  
SAYERS.

which may be enforced in a Court of law. Where a right of action exists, it is against the policy of the law to give effect to an agreement that such a right shall not be enforced through the medium of the ordinary tribunals: *Scott v. The Corporation of Liverpool* (a). In one sense the agreement is not invalid, for an action may be maintained for the breach of it: *Livingston v. Ralli* (b). This is not a covenant which runs with the land; but it is like a covenant not to sue for a limited time, which is not pleadable in bar: *Thimbleby v. Barron* (c), *Ford v. Beech* (d).—He also argued that the covenant did not extend to the assignee of the lessor.

*Mellish*, in support of the plea.—*Scott v. Avery* (e) has overruled the principle of law that parties cannot by agreement oust the superior Courts of their jurisdiction. That case shews that there may be an agreement to refer, which will suspend the right of action until after the decision of the arbitrator. Whether or no this agreement has that effect is a question of construction; and, as there is nothing contrary to law in such an agreement, the Court will construe it according to the intention of the parties. It is conceded that, where there is a mere covenant to refer all disputes to arbitration, that cannot be pleaded in bar of an action: but, where the agreement is that no action shall be brought until after something has been ascertained by an arbitrator, the right of action is suspended. A covenant not to sue for a definite time is no bar to an action: a covenant not to sue at all operates as a release: but where in the same instrument there is a covenant not to sue until a certain event, the whole of the

(a) 21 L. J. Chanc. 276.  
(b) 3 E. & B. 242.  
(c) 3 M. & W. 221.

(d) 11 Q. B. 232.  
(e) 3 H. L. Cas. 411.

instrument must be read together in order to see whether it was not the intention of the parties that no action should be brought: *Lady Foley v. Fletcher* (a). This is not a mere agreement to refer; but on the face of it there is the express intention of the parties that no action shall be brought until after an arbitrator has determined whether the defendant has got the agreed quantity of coal. This is not an independant covenant, but an agreement qualifying the effect of the previous covenant.

1859.  
  
 HORTON  
 v.  
 SAYERS.

*Dowdeswell* replied.

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to judgment. Except for the case of *Scott v. Avery*, there could be no doubt about the matter. That case decided that where a covenant creates a sort of condition precedent to the bringing an action for the breach of it, the remedy in the Courts of Westminster Hall cannot be resorted to until the condition precedent is fulfilled. It appears to me that this case is distinguishable from *Scott v. Avery*; but it is sufficient to say that, not being governed by *Scott v. Avery*, it falls within the rule which has been acted on for above a century, and according to which the superior Courts of law cannot be ousted of their jurisdiction by the mere agreement of the parties; or, in other words, that an agreement to refer does not prevent the parties from resorting to a Court of law to enforce their rights or redress their wrongs. But, even before the case of *Scott v. Avery*, there was a form in which a covenant, or condition, or proviso might be framed, which would prevent the parties from maintaining any action until the amount to be paid was ascertained by a third person; for instance, if there was a

(a) 3 H. & N. 769.

1859.

HORTON

v.

SAYERS.

covenant to pay for building a house, or for the performance of any work, such a sum as A. B. should think reasonable, with a stipulation that the party who performed the work should not claim anything except what A. B. awarded; there the party could not maintain any action until A. B. had found what was due; for there would be no contract to pay in any other way. In this case, however, the deed discloses nothing more than an agreement generally to refer all disputes to arbitration, and that does not prevent the plaintiff from maintaining this action.

MARTIN, B.—I do not dissent; but I cannot distinguish this case from what is laid down by Lord *Campbell* in his judgment in *Scott v. Avery*. It seems to me that, if that judgment is right, this plea is good; and I think that the decision in *Scott v. Avery* cannot be upheld unless the judgment of Lord *Campbell* is right; although I may observe that some of the learned Judges found their judgments on a contrary principle. *Scott v. Avery* was nothing more than the case of a policy of insurance, with a clause that, in the event of any difference between the underwriters and the insured, it should be referred to arbitration. Lord *Campbell* certainly held that an agreement to refer any dispute to arbitration is binding, and that no action can be maintained until after an adjudication by the arbitrator. It seems to me that *Scott v. Avery* has overruled all the previous decisions on the subject. If parties choose to arrange that, before any action is brought on a policy of insurance, an arbitrator shall ascertain the sum to be paid, that seems to me only a circuitous mode of saying that no action shall be brought. I am glad to say that, by the 11th section of the Common Law Procedure Act, 1854, if an action is commenced after the parties have agreed to refer any differences to arbitra-

tion, the Court or a Judge may stay the proceedings. That enactment renders our decision in this case of less importance than it otherwise would have been.

1859.

HORTON

v.  
SAYER.

BRAMWELL, B.—I am of opinion that the plaintiff is entitled to judgment. I think that *Scott v. Avery* was rightly decided, though perhaps I may have some bias in consequence of my having been counsel for the plaintiff. The principle of that decision is very intelligible. If a man covenants to do a particular act, and also covenants that if any dispute shall arise in respect thereof it shall be referred to arbitration, that is the case with reference to which the Courts have used the unfortunate expression that “their jurisdiction is ousted by the agreement of the parties.” On the other hand if a man covenants to do a particular act and that, in the event of his not doing it, the other party shall be entitled to receive such a sum of money as they shall agree upon, or, if they cannot agree, such an amount as shall be determined by an arbitrator, there is no debt which can be sued for until the arbitrator has ascertained what sum is to be paid. For instance, if a person covenants to farm land in a particular manner, or pay such a sum of money as a third person shall award as the damages, no obligation to pay attaches until the amount has been fixed by the referee. Mr. *Mellish* says that, assuming that to be so, looking at the whole of this deed the case falls within that principle. I think it does not. There is a distinct and unqualified covenant by the defendant that he will do a particular act; and also a covenant that if any difference shall arise it shall be referred to arbitration. The parties might, if they thought fit, have so framed the covenant that there would be no cause of action until after arbitration; but they have

1859.

HORTON

v.

SAYER.

not done so, and therefore I think that our judgment ought to be for the plaintiff.

WATSON, B.—I am entirely of the same opinion. The question turns upon the construction of the deed. The defendant covenants that he will raise a certain quantity of coal yearly, and pay a certain rent or royalty; then there is a covenant that all disputes shall be referred to arbitration, and the question is whether that is a qualification of the former covenant as to payment of rent, or an absolute agreement to oust the Courts of their jurisdiction. I am of opinion that it is an independent covenant. It is far wider than the covenant in *Scott v. Avery*, and extends to all matters in difference between the parties, at any time during or after the term, “touching or concerning any covenant, clause, proviso, word, matter or thing in the indenture expressed or contained, or the meaning or construction thereof.” That would apply to covenants for title and for further assurance. It is not that the plaintiff shall not sue until an arbitrator has ascertained the amount to be paid, but that every matter in dispute shall be referred to arbitration. I agree with the construction put upon the deed in *Scott v. Avery* by the majority of the Judges. That was only a covenant not to sue, in this sense—that the plaintiff could not sue on the policy, but the amount to be paid was to be ascertained by an arbitrator, and then he could sue on the award. This covenant is very different: it is an absolute covenant that no action whatever shall be brought.

Judgment for the plaintiff.

1859.

DUCKWORTH, Administrator of INGLE DUCKWORTH,  
deceased, v. JOHNSON.

June 4.

**T**HIS was an action on the 9 & 10 Vict. c. 93, s. 2. The declaration stated that the plaintiff was administrator of one Ingle Duckworth, deceased, and that by reason of the negligence of the defendant a certain wall of the defendant fell on the said Ingle Duckworth and caused his death; whereby the plaintiff, being the father of the said Ingle Duckworth, was put to great expense, and the plaintiff and the mother of the said Ingle Duckworth were deprived of and lost much pecuniary and other assistance which but for the premises the said Ingle Duckworth would have rendered and given to them.

Plea: Not guilty.

The following plea was added at the trial: That the plaintiff and the mother of the deceased were not, nor was either of them, deprived of, nor did they, or either of them lose any such pecuniary, or other assistance as in the declaration alleged, nor did they or either of them sustain any pecuniary loss by reason of the matter in the declaration complained of.—Issue thereon.

At the trial, before *Byles J.*, at the last Liverpool Spring Assizes, the following facts appeared:—The plaintiff was a working mason, who had lived at Manchester until a few days previous to the accident, when he went to Liverpool in search of work, leaving his wife and six children at Manchester. Up to the time he left Manchester, and for a year or two previously, the deceased, who was a boy of

In an action, on the 9 & 10 Vict. c. 93, by a father for injury resulting from the death of his son, it appeared that the father was a working mason and that the son was a boy of fourteen years of age who had earned 4s. a week for about a year or two, but at the time of his death was without employment.

There was no evidence of the cost of boarding and clothing the boy. The Judge having left it to the jury to say whether the father had sustained any pecuniary loss by the death of his son, and the jury having found a verdict with 20l. damages: —*Held*, that as there was evidence for the jury, the plaintiff was entitled to retain the verdict for the full amount.

Such an action cannot be maintained without some evidence of actual pecuniary damage.

1859.  
—  
DUCKWORTH  
v.  
JOHNSON.

fourteen years of age, had been employed in a painter's shop, where he received the wages of 4s. a week. The plaintiff returned to Manchester, and took the deceased with him to Liverpool. He sent him to a pawnbroker's to pawn a coat, in order to raise funds to bring the rest of the family from Manchester to Liverpool, and as he was returning a wall of the defendant's timber yard fell upon and killed him. The fall of the wall was occasioned by its being in a ruinous and dangerous condition; and it was admitted that the accident arose from the negligence of the defendant.

It was submitted, on behalf of the defendant, that no such pecuniary loss had resulted to the plaintiff from the death of the deceased as entitled him to maintain the action. The learned Judge told the jury that they ought to consider whether any damage was shewn, and, if any, to what amount: that they ought not to give any damages for wounded feelings, but must confine themselves strictly to pecuniary loss: that the question was, whether the parents had sustained any pecuniary loss by the death of this boy of fourteen years of age, who had been earning 4s. a week, bearing in mind that they had to lodge, clothe and feed him. And he told them that, if no pecuniary damage was sustained, they must find for the defendant. The jury found a verdict for the plaintiff, with 20*l.* damages; and leave was reserved to the defendant to move to enter the verdict for him.

*Atherton*, in last Easter Term, obtained a rule nisi to enter the verdict for the defendant pursuant to the leave reserved, or to reduce the damages to a nominal amount, on the ground that no such loss or damage was shewn to have resulted from the death of the intestate as would entitle the plaintiff to maintain the action, or to recover more than nominal damages.

*Edward James, Milward and McCulloch* shewed cause (June 3).—First, assuming that there was no evidence of actual damage, still the action is maintainable, it being admitted that the death of the plaintiff's son was caused by the negligence of the defendant. The 9 & 10 Vict. c. 93, s. 1, recites that "whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person" &c.; it then enacts "that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured" &c. Here there was negligence which would have entitled the boy to maintain an action if he had not been killed, and therefore the defendant is liable in this action for nominal damages at the least. [*Pollock*, C. B.—'The recital in the 1st section of the Act goes on, "and it is *oftentimes* right and expedient that the wrongdoer in such case should be answerable in damages,"—not *always*. That means, if damages have been sustained; if not, the action is not maintainable.] The enacting part of the 1st section gives a right of action in every case where, if the deceased had survived, he might have maintained an action; and that enactment, being clear and express, cannot be restrained by the recital.—Secondly, the plaintiff is entitled to retain the verdict for the full amount recovered. The jury, having been properly directed, have found that the plaintiff has sustained damage, and the evidence justifies that finding. In order to maintain the action it is not necessary that there should be an actual loss; it is sufficient if there was

1859.

DUCKWORTH  
v.  
JOHNSON.

1859.  
  
 DUCKWORTH  
 v.  
 JOHNSON.

a reasonable expectation of pecuniary advantage from the continuance of the life of the deceased: *Franklin v. The South Eastern Railway Company* (a). That principle was recognised and adopted by the Court of Common Pleas in the case of *Dalton v. The South Eastern Railway Company* (b).

*Atherton*, in support of the rule.—In order to support an action of this kind there must be substantial and not merely nominal damage, and the jury in estimating it cannot take into consideration mental suffering, but must give compensation for pecuniary loss only: *Blake v. The Midland Railway Company* (c). The principle laid down in the cases of *Franklin v. The South Eastern Railway Company* and *Dalton v. The South Eastern Railway Company* is not disputed; but here there was no evidence of a reasonable expectation of pecuniary benefit from the life of the deceased. At the time of his death he was without employment, and it was not proved that the cost of boarding and clothing him did not exceed 4s. a week; so that, from anything which appears, he might always have been a burden to his parents. The argument for the plaintiff would go to this extent, that, though a child had never earned anything, the jury might take into consideration the probability of its doing so at some time or other.

*Cur. adv. vult.*

POLLOCK, C. B., now said:—This was an action by a father, as administrator of his deceased son, to recover damages by reason of the son, a boy fourteen years of age, having been killed by the falling of a wall in consequence of the defendant's negligence; and the question was, whe-

(a) 3 H. & N. 211.

(b) 4 C. B., N. S. 296.

(c) 18 Q. B. 93.

ther the plaintiff had sustained any damage by the death of his son, so as to entitle him to maintain an action under Lord Campbell's Act, 9 & 10 Vict. c. 93. It was admitted that the damage must be a pecuniary damage. It appeared that, a day or two before the accident, the father had brought the boy from Manchester to Liverpool, and that for two years and a half before he left Manchester he had earned 4s. a week; and the question was, whether that circumstance gave the father a pecuniary interest in the life of the boy, his earnings having always been brought into what may be called the common stock of the family. The questions are whether a verdict can be entered for the defendant, on the ground that the action cannot be maintained, or the damages reduced to a nominal amount, on the ground that there was a right of action but that no damage was sustained. My opinion is that, looking at the act of parliament, if there was no damage the action is not maintainable. It appears to me that it was intended by the Act to give compensation for damage sustained, and not to enable persons to sue in respect of some imaginary damage, and so punish those who are guilty of negligence by making them pay costs. That disposes of the question as to reducing the damages to a nominal amount.

The jury found that the plaintiff sustained damages to the extent of 20%. Can we set aside that verdict and enter it for the defendant? I think not. There was evidence, which very likely satisfied the jury as to the matter of profit and loss, quite apart from any consideration of parental affection. It is true that no distinct evidence was given of the value of the boy's services, and the cost of boarding and clothing him; but as to that the jury were better able to judge than we are. Probably they thought that there would be some balance every week in favour of the father, the value of which might amount to 20%. It

1859.  
DUCKWORTH  
v.  
JOHNSON.

1859.

DUCKWORTH

v.  
JOHNSON.

having been decided that a reasonable prospect of pecuniary benefit may be taken into consideration, it is impossible for us to say that the jury were not warranted in finding the verdict which they have done. The result is that the rule must be discharged.

MARTIN, B.—I am of the same opinion. It is clear that we cannot enter the verdict for the defendant, because the evidence was that for two years and a half before the accident the boy earned 4s. a week. It is true that he was not in any employment at the time he was killed, having lately come from Manchester to reside with his parents at Liverpool; but how can it be said that there was no evidence of pecuniary damage. We cannot enter a verdict for nominal damages, because the jury had a right to say what was the amount of the pecuniary loss. It was argued that it ought to have been proved that the cost of boarding and clothing the boy did not exceed 4s. a week; but that was a question for the jury to determine. If damages are to be given, I think that 20*l.* is not too much.

BRAMWELL, B.—I am of the same opinion. The doubt I had was whether such evidence should not have been given as my brother *Martin* has adverted to; for, if the jury are solely to judge in such matters in every case where a child is killed, it will be difficult to prevent them from giving damages by way of solatium; whereas, if the plaintiff is compelled to give evidence of the value of the child's services, and the cost of maintaining him, it might keep the matter straight and prevent injustice being done. I own I have considerable difficulty on this point; but I am quite reconciled to discharging the rule, because I do not think that this specific objection was taken at the trial.

WATSON, B. —I am also of opinion that the rule ought to be discharged. On one part of the case I have no doubt, namely, that no action can be maintained under the 9 & 10 Vict. c. 93, unless the plaintiff proves actual damage. I am clearly of opinion that negligence alone, without damage, does not create a cause of action. It was pointed out in the course of the argument that it is only for pecuniary loss that the plaintiff is entitled to maintain the action, and that he is not to be compensated for any pain or suffering arising from the loss of the deceased. As to the other point I had some doubt, and that doubt is not quite removed from my mind; but, upon the whole, I think that it would have been impossible to withhold the matter from the jury. The law has been laid down in one case in this Court, and in another in the Court of Common Pleas, that anticipated benefit may be the subject-matter of damage in this action. Here the plaintiff had a son, of the age of fourteen, who had been earning 4s. a week; what was the value of this to the father was a matter to be submitted to the jury. No doubt in places where the father works with the children there is great advantage to a father in having many children who obtain work; and the death of any one of them may be a pecuniary loss to him; on the other hand, he may suffer no loss whatever. But there must be some evidence of a prospect of benefit. The jury found that the plaintiff has sustained damage; and, in asserting this, they affirm that the loss is not a mere surmise, but a loss of actual pecuniary advantage. On these grounds, although I have entertained some doubt, I think that the rule ought to be discharged.

Rule discharged.

1859.  
DUCKWORTH  
v.  
JOHNSON.

1859.

May 26.

RICHARDS v. JOHNSTON.

A sheriff who comes to seize the goods of a debtor under a writ of execution is not bound by an estoppel, which might have prevented the debtor himself from claiming the goods.

M. being the owner of goods procured H. to assign them by bill of sale to R., to secure an advance of money. R. took the goods *bonâ fide*, and upon the assurance of M. that the goods belonged to H. The goods were afterwards seized under a *fi. fa.* as the goods of M. On the trial of an interpleader issue between R. and the execution creditor, the jury found that there had been no actual transfer of the goods from M. to H. — *Held*, that R. had acquired no title to the goods as against the execution creditor.

**INTERPLEADER.**—The question was whether, on the 18th of October, 1858, certain goods seized in execution by the sheriff of Hertfordshire, under a writ of *fi. fa.* directed to the said sheriff for having execution of a judgment recovered by William Johnston against R. H. Martin, were the property of George Richards as against the said William Johnston.

At the trial before *Channell, B.*, Richards, the claimant, an auctioneer residing in London, proved that in May 1858, one Hord, who was the father-in-law of Martin, applied to him for a loan, and offered a bill of sale of the furniture at Rose Cottage, Stevenage. Richards went down to Stevenage and took the inventory which was read over to Martin and Hord, who were both present and living in the house. A bill of sale of the furniture in question, in favour of Richards, was executed by Hord, as the assignor, in Martin's presence, on the 27th of May, and duly registered on the 1st of June, 1858. Martin stated to Richards that the goods were Hord's, and went with Hord before a magistrate, when Hord, in Martin's presence, made a statutory declaration that the goods were his (Hord's) own property. On their return Richards again asked whether the goods were Hord's, when Martin answered, "Do you think I would allow Hord to perjure himself?" Richards then advanced the money.

The defendant, the execution creditor, who was an upholsterer, proved that the goods seized had been sold and supplied by him to Martin, and were seized under

the fi. fa. against Martin at his suit on the 18th of October, 1858.

1859.

RICHARDS  
v.  
JOHNSTON.

Upon this evidence the learned Judge asked the jury whether there had been any dealing between Hord and Martin so as to make the furniture the property of Hord as between himself and Martin; and, if not, whether in point of fact there had been an actual transfer of the goods from Martin to Hord. The jury found that there had been no actual transfer from Martin to Hord before the 27th of May, 1858. The learned Judge directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a verdict in his favour.

*Lush*, in Easter Term, obtained a rule to set aside the verdict for the plaintiff and enter a verdict for the defendant, on the ground that the bill of sale did not pass the property to the plaintiff; that the defendant was not bound by it, and that such a transaction is contrary to the policy of, and avoided by the Act for the registration of Bills of Sale (17 & 18 Vict. c. 36).

*Huddleston* and *Beasley* now shewed cause.—Martin would not have been permitted, as against the plaintiff, to say that the goods were not Hord's. The case falls within the rule of law stated in *Pickard v. Sears* (a), that "where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." That doctrine was confirmed in *Gregg v. Wells* (b), *Howard v. Hudson* (c), *Clarke v. Hart* (d), and *Freeman v. Cooke* (e).

(a) 6 A. &amp; E. 469.

(d) 6 H. L. 633.

(b) 10 A. &amp; E. 90.

(e) 2 Exch. 654.

(c) 2 E. &amp; B. 1.

1859.  
 ~~~~~  
 RICHARDS  
 v.  
 JOHNSTON.

It would have been enough to estop Martin if he had simply stood by and allowed Hord to deal with the goods as his own; but Martin did more, for he asserted that they were so. Martin being estopped from denying Hord's title, Hord must be taken to have had authority as Martin's agent to transfer the property: *Waller v. Drakeford* (a). The execution creditor can be in no better position than Martin. [Channell, B.—It is clear that Martin would have been estopped. But why should Martin's creditors be estopped?] All parties and privies are estopped. Johnston, as execution creditor, can have no better title than the execution debtor, whose goods he has seized and now claims. [Martin, B., referred to the judgment of the Court in *Heane v. Rogers* (b)]. In *Morewood v. The South Eastern Railway Company* (c), Bramwell, B., told the jury "It is immaterial whether the property was bonâ fide transferred from Watson to Morewood \* \* If A., the owner, professes to sell to B. and does not really do so, and then A. stands by while B. sells the same goods to C., then, as against A. and B., the second assignee C. has a good title. If the assignment to Baine was bonâ fide, that is, without any private bargain between him and Morewood, the claimant Baine is entitled to your verdict." [Watson, B.—There the assignment was good as between the parties.] The 17 & 18 Vict. c. 36, s. 1, which provides that bills of sale shall be void unless a copy is filed within twenty-one days does not affect the question, because the plaintiff's title as against Martin's creditors depends upon the estoppel and not upon the existence of a bill of sale from Martin. [Martin, B.—The execution creditor claims adversely to Martin. Pollock, C. B.—Is

(a) 1 E. & B. 749.

(b) 9 B. & C. 577.

(c) 1 Fost. & Finl. 308. See

S. C. nom. *Morewood v. The South Yorkshire Railway and River Dun Company*, 3 H. & N. 798.

there any authority that an execution creditor cannot claim any property which the execution debtor has disabled himself from claiming.] The goods could only be taken as Martin's goods; consequently, if Martin had no title, there is an end of the right of the sheriff to seize them.

1859.  
 RICHARDS  
 v.  
 JOHNSTON.

*Lush* and *H. James*, in support of the rule.—There is no authority that an execution creditor claims under the execution debtor. In *Harris v. Rickett* (a), *Bramwell*, B., suggests that the assignees of a bankrupt claim adversely to the bankrupt, and are therefore not bound by written admissions made by him. A fortiori execution creditors are not estopped by the language or conduct of the execution debtor. Were they so, execution creditors would be barred by the frauds of execution debtors, perpetrated with intent to prejudice their rights. [*Martin*, B.—Suppose an action against the sheriff for not seizing goods assigned by a fraudulent bill of sale: It is clear that though the execution debtor might be estopped by the bill of sale, it would be no answer for the sheriff.]

*POLLOCK*, C. B.—We are all of opinion that the rule must be absolute. It is possible that a different view might have been taken if, instead of the present rule, an application had been made on the ground that something different ought to have been left to the jury, or that the jury ought to have found something other than that which they did find. We have to dispose of the question as it arises upon the rule, and I think it must be absolute on the ground stated by the defendant's counsel; viz. that a sheriff who comes to seize the goods of a debtor armed with a writ of execution in favour of a creditor, is not bound by estoppels

(a) 4 H. & N. 1. See p. 6.

1859.  
RICHARDS  
v.  
JOHNSTON.

which might have prevented the debtor himself from claiming the goods.

MARTIN, B.—I agree that the rule must be absolute, though I should have been more satisfied if the claimant had succeeded. There is no doubt but that Martin stood by and assented while his father in law assigned the goods to the claimant, who lent his money and took the assignment honestly. But Martin was no party to the assignment. There was therefore only a title by estoppel as against him. In *Heane v. Rogers (a) Bayley, J.*, in delivering the judgment of the Court, says:—"There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is \* \* \* not estopped or concluded by them, unless another person has been induced by them to alter his condition. In such a case the party is estopped from disputing their truth with respect to that person and those claiming under him and that transaction; but as to third persons he is not bound. It is a well established rule of law that estoppels bind parties and privies, and not strangers" (b). It is clear that, if an action of trover had been brought against Martin by the present claimant, Martin would have been estopped. But no authority has been cited to shew that a judgment creditor is party or privy to the acts of the judgment debtor. The *fi. fa.* directs the sheriff to seize the goods of the debtor. The sheriff is a stranger to the debtor, and the only question for him is—Are these goods the goods of the debtor or not? Therefore, on this rule, we must say that the sheriff

(a) 9 B. & C. 577. See p. 586.

(b) Citing Co. Litt. 352 a.; Com. Dig. Estoppel (C).

and the execution creditor are not bound by the estoppel which would affect the execution debtor. I should have been better pleased if the jury had found that there had been a gift of the goods by Martin to Hord.

1859.

RICHARDS  
v.  
JOHNSTON.

WATSON, B.—I agree that the rule must be absolute. The law is clear. Martin purchased the goods; but he represented Hord to be the person to whom the goods belonged. Then was there a valid transfer? No: because, though Martin may be estopped, there was no transfer of any kind, no pretence of any transfer from Martin to Hord: therefore the property did not pass at all. The interpleader issue is merely a substitute for an action against the sheriff, and the question here is the same as it would have been in such action.

CHANNELL, B.—The question is, whether the goods were the goods of the plaintiff as against the execution creditor. It was contended, and rightly, on the part of the defendant, that, whatever may have been the case as against Martin, there was no estoppel which could prevail against the execution creditor. The jury found distinctly that there was no transfer by Martin to Hord. I therefore think that the rule must be absolute.

Rule absolute.



1859.

June 15.

## In re WILLIAM PARKER, Deceased.

A bequest of money for the purpose of building a church and parsonage-house, and of endowing and repairing the church, is subject to a legacy duty of 10% per cent.

**I**N this case a writ of summons issued, by consent, under the 47th and 48th sections of the Succession Duty Act, 1853, for the purpose of taking the opinion of the Court as to whether money left by the testator for building and endowing a church was liable to legacy duty or succession duty. The facts appeared in an affidavit of W. Nanson, used on shewing cause, the material parts of which are as follows:—

1. I am one of the executors and trustees of the will of William Parker, late of Skirwith Abbey, in the parish of Kirkland, in the county of Cumberland, deceased, the testator in this matter.

2. In the year 1855, the said W. Parker being desirous of building and endowing a church in the township of Skirwith, in the parish of Kirkland, for the benefit of the inhabitants of the township, and of annexing the patronage or advowson thereof to his Skirwith Abbey estate, submitted to the Bishop of the diocese, to the Dean and Chapter of Carlisle, as patrons of the advowson of the parish of Kirkland, to the Rev. J. Huntley, the vicar of the parish, a proposal for that purpose, and requested them, under the provisions of the 8 & 9 Vict. c. 70, and the 11 & 12 Vict. c. 37, to vest the right of nominating the minister of the said church in him the said W. Parker, his heirs and assigns in perpetuity.

3. The proposal was accepted, and by an agreement, dated the 23rd June, 1855, and made between the Bishop of Carlisle of the first part, the Dean and Chapter of Carlisle of the second part, the Rev. J. Huntley of the third.

part, and the said W. Parker of the fourth part, the several parties thereto of the first, second and third parts, by virtue and in exercise of the powers and authorities in the said Acts contained, did solemnly and absolutely declare, promise, and agree to and with W. Parker, his heirs and assigns, that when and as soon as the said intended new church so proposed to be erected and endowed by the said W. Parker should have been duly consecrated, then thenceforth the right of nominating a minister to the said church, at all times whenever it should be requisite, should for ever be in and be exercised by the said W. Parker, his heirs and assigns.

4. By a deed made under the authority of the Church Building Acts, and dated the 12th September, 1855, the said W. Parker conveyed to her Majesty's Commissioners for building new churches, a piece of land in the township of Skirwith for the site of the said church.

5. The said W. Parker also provided the endowment fund for the proposed church by the purchase in his own name of 3370*l.* 16*s.* 2*d.* Three per cent. Bank Annuities.

6. The said W. Parker had not at the time of his death commenced the erection of the said church and parsonage, but he had employed an architect with reference thereto, and had in a great measure arranged the plans.

7. The said W. Parker made a codicil to his will, dated the 10th October, 1855, which, after reciting the before mentioned agreement, contains the following directions:—  
“I do hereby direct that, in case I shall in my lifetime have begun to erect and build the said church and parsonage-house, or either of them, and the same respectively, or either of them, shall not be completely finished and fitted up at the time of my decease, the trustees or trustee for the time being of my will shall, immediately upon my decease, proceed to complete and finish and fit up the same respectively,

1859.

IN RE  
WILLIAM  
PARKER.

1859.

IN RE  
WILLIAM  
PARKER.

in accordance with the plans which I may have adopted, with such variation only therein as unforeseen circumstances may render necessary, and the said trustees or trustee, in the exercise of their or his discretion, shall consider it advisable to make; but, in case the erection of the said church and parsonage-house, or either of them, shall not have been commenced at the time of my decease, then I direct that my trustees or trustee shall, immediately upon my decease, proceed with the erection and fitting up thereof, or such of them as shall not have been begun to be built; and I direct that such church and parsonage-house shall be built in accordance with the plans which I may have selected and adopted. But, in case I shall not have selected any plan for the erection of such church and parsonage-house, or either of them, then I direct that the same shall be erected and built according to such plans as the trustees or trustee for the time being of my will shall, in the exercise of their or his discretion, think fit to adopt; and, as some guide to my trustees in selecting and adopting any plan, but not so as in any manner to confine them within any limit, I estimate the cost of erecting and building and fitting up the church at the sum of 1000*l.*, or from that sum to 1200*l.*, and the cost of erecting and fitting up, but not of furnishing the parsonage-house, at the sum of 500*l.*, or from that sum to 600*l.*; and I authorize and empower and expressly direct the trustees or trustee for the time being of this my will, to apply so much and such part of my personal estate, as in their or his judgment shall be requisite or necessary (having regard as nearly as may be to the respective estimates above mentioned), in erecting and building and fitting up, or, as the case may be, in completing and finishing and fitting up the said church and parsonage-house, whether the cost thereof exceed or fall short of the sums hereinbefore mentioned as the estimated or probable amount thereof, so and

in such manner as that the same church may, as soon as practicable, be made ready for consecration, and the said parsonage-house may be made fit for habitation; and for the purpose of forming an endowment fund, in case I shall not have provided one in my lifetime, I give unto the trustees or trustee for the time being of my will, the sum of 3370*l*. Three per cent. Consolidated Bank Annuities, upon trust that my said trustees or trustee do and shall, either retain the same in their, or his names, or name, upon the trusts and for the purposes hereinafter declared, or at their, or his discretion transfer, assign, or make over the said bank annuities to the governors of the bounty of Queen Anne, to be held by such governors upon the same trusts, and for the same purposes as the same would have been subject, or liable to, in case the same had been retained by the said trustees or trustee in their, or his own names or name. And I direct that my said trustees, or trustee shall stand possessed of and interested in the said sum of 3370*l*. Three per cent. Consolidated Bank Annuities, upon trust to accumulate the dividends thereof until a minister shall be appointed to the said church; and then, and from thenceforth to pay the dividends of the said accumulated fund, when and as such dividends shall accrue, unto the minister for the time being of the said church, or at his request to authorize and empower him to receive the same, so long as he shall continue the minister thereof, with a proportionate part thereof for the time which may have elapsed between the last half-yearly day of payment thereof, and the day of his resignation or death; and on the nomination and appointment of any new or succeeding minister, to pay the dividends to him during the term of his incumbency, together with any dividends which may have accrued due between the day of the death, or resignation of his predecessor, and the day of his own appointment. And for

1859.

IN RE  
WILLIAM  
PARKER.

1859.

IN RE  
WILLIAM  
PARKER.

the purpose of providing a fund for the repair of the said church, in case I shall not have provided one in my lifetime, I give unto the trustees or trustee for the time being of my will such a sum in the Three per cent. Consolidated Annuities as at the market price thereof at the time of providing the said fund shall be equal in amount to 5*l*. sterling of every 100*l*. sterling of the original cost of the erecting and fitting up the said church. And I direct that my said trustees or trustee shall either retain the same in their, or his names, or name, upon the trusts, and for the purposes hereinafter expressed, or at their, or his discretion, either immediately upon my decease, or at any time thereafter, transfer the same into the Incorporated Society for Promoting the Enlargement, Building and Repairing of Churches and Chapels, to be by them applied in, or towards the keeping the said church in repair, in case the said society shall be willing to undertake the trusts thereof; or, if my said trustees or trustee shall think proper so to do, to transfer the same into the names of three persons hereinafter mentioned, that is to say, the incumbent, or minister for the time being of the said intended new church, the vicar for the time being of the parish church of Kirkland aforesaid, and the incumbent, or minister for the time being of the church or chapel of Culgairth, in the said parish of Kirkland, to be held by such three persons and their successors, the ministers for the time being of the said respective churches, upon the trusts hereinafter declared. And I direct that the trustees or trustee for the time being of my will, in case, and so long as the said sum of Three per cent. Consolidated Bank Annuities shall be retained by them in their, or his own names, or name; and in like manner the ministers for the time being of the said respective churches, in case the said bank annuities shall be transferred into their names, shall stand possessed of, and interested in the

said sum of Three per cent. Consolidated Bank Annuities, upon trust to lay out and apply the dividends thereof in, or towards the repairing and keeping the said church in substantial and necessary repair, and to accumulate the unapplied dividends by investing the same in the funds, but the whole of such accumulation shall be liable to be applied and paid from time to time, when and as it shall be necessary to have recourse thereto, for the same purposes and in the same manner as the dividends arising from the said original fund."

8. By the same codicil the said W. Parker devised the perpetual right of nominating a minister to the intended new church, to certain persons, upon the same trusts as were by his will declared concerning his estate called Skirwith Abbey Estate.

9. After the death of the said W. Parker, I and my co-executors entered into a contract for the erection of the said church and parsonage-house, for the sum of 2893*l.*, and the same are now in the course of erection, and in my opinion the entire cost thereof when completed, together with the repair fund, will amount to about 3000*l.*

*Bovill* and *P. Thompson* now shewed cause.—First, the sums directed by the testator to be applied to the building of the church and parsonage-house, and the endowment and repair of the church, are not subject to legacy duty. The Acts relating to legacy duty are the 36 Geo. 3, c. 52, and the 55 Geo. 3, c. 184, Schedule, Part 3, tit. "Legacy." The latter imposes a duty on "every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards," &c., and the duty varies according to the degree of relationship between the testator and the legatee. It was never intended that a person should pay legacy duty unless he became beneficially interested

1859.

IN RE  
WILLIAM  
PARKER.

1859.  
 IN RE  
 WILLIAM  
 PARKER.

in the legacy. If a legacy be given to trustees in trust for a third person, the duty is chargeable according to the degree of relationship to the testator of the person so beneficially interested, and not of the trustees. There must, however, be some person to be benefited. The only case which militates against that principle is *In re Franklin's Charity* (a). There the testator bequeathed to the poor of a parish 50*l.* a year, to be laid out at Christmas in bread, and distributed by the minister and churchwardens to the most needy objects of the parish; and Sir *L. Shadwell*, V. C., held that legacy duty attached. But in *Ex parte Wilkinson* (b), where there was a bequest of a residue in trust to divide the interest among poor pious persons, male and female, old or infirm, in sums of 10*l.* or 15*l.* as the trustees should see fit, not omitting large and sick families of good character, this Court held that legacy duty was not payable; and that decision was afterwards affirmed in the Court of Exchequer Chamber: *The Attorney General v. Nash* (c). [*Pollock*, C. B.—It proceeded on the ground that no one received a legacy of the amount of 20*l.* Is not a legacy duty of 10*l.* per cent. paid upon bequests to hospitals?] It is: and the reason is that the entire control and power over the legacy is vested in the governors of the hospital, and therefore they are considered as taking the beneficial interest. If, in this case, the trustees were a body associated together for the purpose of conferring a spiritual or pecuniary benefit on the inhabitants of the parish, and the testator had left them this money for carrying out their own views, the case would have fallen within that principle. The grounds of the judgment in *In re Wilkinson* are equally applicable to this case. There is no person who takes any pecuniary or beneficial interest in

(a) 3 Y. & J. 544.

(b) 1 C. M. & R. 142.

(c) 1 M. & W. 237.

this legacy, inasmuch as it is devoted to ecclesiastical purposes, except so far as the advowson or right of presentation may be the subject of sale. The trustees have no power to apply the money in any other way than in carrying into effect the agreement entered into by the testator with the patron and ordinary. [*Martin, B.—In re Griffiths (a)* seems to be conclusive.] The duty ought not to be imposed by a strained construction of the acts of parliament, but only by clear and unambiguous words, and the established principle is that, unless there is a beneficial interest, no duty is payable. [*Pollock, C. B.—*Suppose a person left 10,000*l.* to gild the dome of St. Paul's, would that be liable to legacy duty?] It would not; for no one would take any beneficial interest in the legacy. The real effect of this transaction is, that the testator provided land and money for the purchase of an advowson or right of presentation, and the duty should have been assessed on its value under the 24th section of the Succession Duty Act, 1853. [*Martin, B.—*Do you mean that, if a person leaves 10,000*l.* in trust to buy an estate, the duty is to be charged upon the land and not upon the money?] That is provided for by the 30th section of the Succession Duty Act, 1853. [*The Solicitor General* referred to the 19th section of the 36 Geo. 3, c. 52.] The 6th section of the 36 Geo. 3, c. 54, shews that there must be a benefit to some person. [*Pollock, C. B.—*There may be a case in which a legacy is not beneficial to anybody, still I think it would be liable to duty. For instance, suppose a legacy of 10,000*l.* to A. B. to purchase a celebrated picture for the National Gallery, or, as I before said, to gild the dome of St. Paul's, or improve a public walk by laying down pavement instead of gravel, in such and the like cases I think that legacy duty would be payable. *Martin, B.—*The gilding of the dome

1859.

IN RE  
WILLIAM  
PARKER.

(a) 14 M. &amp; W. 510.

1859.

IN RE  
WILLIAM  
PARKER.

of St. Paul's would not be beneficial to anybody but the workmen employed to do it.] In the case of *The Attorney General v. Fitzgerald (a)*, where the testator gave his residuary estate to his executors, "to be by them appropriated to the education of the children of the poor in Ireland, principally those in and about the city of Limerick," Sir *L. Shadwell*, V. C., held that legacy duty was payable; but his judgment proceeded on the ground that it was a gift for the benefit of some portion of the human race, and was therefore assessable as a legacy for the benefit of persons, strangers in blood to the deceased; and moreover it was so given that it did not fall within the 11th section of the 36 Geo. 3, c. 52, or within the reasoning of the Judges in *In re Wilkinson*. In *In re Griffiths (b)*, where there was a bequest of a sum of money to trustees to apply the dividends in establishing and supporting a school, the judgment of *Parke*, B., proceeded on the ground that the case was the same as if the money had been bequeathed to the trustees of an existing school, who have been considered as taking a beneficial interest. Here the trustees merely lay out the money in the purchase of a right of presentation. [*Watson*, B.—The gift is beneficial in providing a church for the district and saving the inhabitants the expense of building one or of enlarging the parish church.] That benefit does not arise from the gift alone, but also from the bargain between the ordinary, the patron and the testator.—They also referred to the 27th and 28th sections of the 36 Geo. 3, c. 52.

Secondly, the bequest does not fall within the 16th section of the Succession Duty Act, 1853, as property "subject to a trust for charitable or public purposes." It is a gift in fulfilment of the agreement and for the purpose of obtaining the right of presentation. Where property is

(a) 13 Sim. 83.

(b) 14 M. &amp; W. 510.

left for charitable or public purposes the trustees are empowered to raise the duty on the security of the property; but in this case they cannot, for the property is devoted to ecclesiastical purposes for ever. The executors are bound to expend, in building and endowing the church, the whole amount given by the testator; but if duty is chargeable they must raise it from the residue, so that the burthen will fall on the residuary legatee, who ought not to bear it. Moreover, this property will be doubly taxed, inasmuch as, if the right of presentation is sold, duty must be paid on the purchase money. [*Martin, B.*—The right of presentation is a new species of property arising out of the church: it is essentially different from the property in the church itself.] Under the 20th and 21st sections of the Succession Duty Act duty is only payable when the party comes into possession and is in the actual enjoyment of the property.

1859.  
IN RE  
WILLIAM  
PARKER.

*The Solicitor General* and *Beavan* appeared in support of the rule, but were not called upon to argue.

POLLOCK, C. B.—The question is, whether certain sums of money, directed by the testator to be laid out in building, endowing and maintaining a church, are liable to legacy duty. I am of opinion that they are. The money is not given in discharge of any obligation binding the testator or his estate, but there is merely a direction that it shall be laid out in that particular way; and it appears to me that, according to the words of the Legacy Duty Acts and the construction which they have received in previous decisions, we are bound by authority to hold that the funds in question are liable to legacy duty. Mr. *Bovill* founded his argument chiefly on the case of *In re Wilkinson* (a), decided in this Court, and afterwards confirmed in

(a) 1 C. M. & R. 142.

1859.

IN RE  
WILLIAM  
PARKER.

the Court of Exchequer Chamber in *The Attorney General v. Nash* (a). The decision of this Court undoubtedly proceeded on the ground that ultimately the money would be applied in giving to each of several persons, at the pleasure of the trustees, a sum of money under 20*l.*; and the decision of the Court of Exchequer Chamber appears to have proceeded on the same ground. The reference by Lord Deaman, in delivering the judgment of that Court, to the 11th section of the 36 Geo. 3, c. 52, seems to me to make that clear, and but for that decision, founded as it is upon that section, I should not have thought it necessary to occupy time in explaining why I am prepared to give judgment for the Crown. The 11th section provides, "that if any benefit shall be given by any will or testamentary instrument, in such terms that the amount or value of such benefit can only be ascertained from time to time by the actual application for that purpose of the fund allotted for such purpose or made chargeable therewith, or if the amount or value of any benefit given by any will or testamentary instrument cannot, by reason of the form and manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained, then and in every such case such duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by the will or testamentary instrument as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes, or charged with answering the same." It is difficult to say that the 11th section does not afford strong reason for the judgment of this Court in *Ex re Wilkinson*; at the same time, it seems to me that it would have been competent to the Court to have decided the other way, and to have said that there was no difficulty

(a) 1 M. & W. 237.

in ascertaining the duty, for a large sum of money being left to trustees for the purpose of being applied in a particular manner, and for the benefit of persons strangers in blood to the testator, 10*l*. per cent. must be deducted from that amount. In a very elaborate judgment Baron *Parke* came to the conclusion that the persons intended to be benefited were the poor people, and that, as they never would receive so much as 20*l*. each, no legacy duty was chargeable upon their portions, and as the whole fund would be exhausted by the distribution amongst such persons no legacy duty whatever was payable. Lord *Denman*, in his judgment in the Exchequer Chamber, remarks that the 11th section of the 36 Geo. 3, c. 52, was not brought under the notice of the Vice Chancellor in *In re Franklin's Charity*. The practice of charging the duty on bequests to charitable corporations or societies was not questioned. Where money is bequeathed to an hospital, the practice has been universal for the Crown to claim the duty of 10*l*. per cent., and that claim has always been acquiesced in. It may be said that no one receives any *pecuniary* benefit from being admitted into an hospital, but nevertheless there is a beneficial interest in respect of which the executors are bound to pay legacy duty. In the subsequent case of *In re Griffiths* (a) it appears to me that Baron *Parke* rather doubts the correctness of his decision in *In re Wilkinson*, and he expressly says that the subject has undergone further consideration by the Vice Chancellor in the case of *The Attorney General v. Fitzgerald* (b). There the Vice Chancellor upheld his former opinion, and in the case of *In re Griffiths* Baron *Parke* adopted the principle that where money is bequeathed for some public purpose, either to the committee of a charity, or the persons administering it, or to trustees, in order that it may

1859.

IN RE  
WILLIAM  
PARKER.

(a) 14 M. &amp; W. 510.

(b) 13 Sim. 83.

1859.

IN RE  
WILLIAM  
PARKER.

be applied to such purpose, it must be considered as a legacy for the benefit of strangers in blood to the testator, and liable to the duty of 10*l.* per cent. That appears to me the true state of the law on this subject. It has been suggested that a legacy may possibly be beneficial to no one; but, if so, I doubt whether the executors would be bound to carry into effect the directions of the testator. It may therefore be laid down as a general rule, that where money is bequeathed, whether to those who administer a charity, or who administer funds for any public purpose, ecclesiastical or otherwise, it is subject to a legacy duty of 10*l.* per cent., inasmuch as it is to be considered a legacy for the benefit of persons strangers in blood to the testator. For these reasons I think that in this case the Crown is entitled to legacy duty.

MARTIN, B.—I am of the same opinion. The question for our determination is, whether the direction in the codicil of the testator, to apply a certain part of his personal estate in building a church and parsonage and creating an endowment, renders that portion of his estate chargeable with legacy duty. If this had been a new question I should have thought it very arguable, but it has been decided for many years that such a gift is chargeable; and I find it stated by Vice Chancellor *Shadwell* that there had been, by the general assent of mankind, a construction put upon these statutes so as to charge such bequests with duty. Therefore I consider the matter settled. In *In re Wilkinson* it was said by *Parke*, B., that there must be some person who derives a benefit from the bequest. Here the persons who would derive a benefit from the first sum, that is, the money to be expended in building the church, would be the inhabitants of the district where it is erected. As to the second sum, the 3370*l.* 16*s.* 2*d.* consols, there is an

obvious party to be benefited, viz. the clergyman who is to receive the proceeds of it for his income. If any benefit is required that is as direct a benefit as can be; but it seems to me that when it has been decided that a bequest of money for the purpose of establishing a school in Limerick, and another bequest of stock for the instruction of twenty boys at Newtown, are liable to legacy duty, it cannot be said that duty is not payable in this case. In my opinion there is no distinction between a bequest of money for the erection of a church and a bequest of money for the instruction of poor children—the one is to promote religion, the other education. Therefore I think that these sums are clearly liable to legacy duty.

This is the conclusion to which I should have arrived if the Succession Duty Act had not passed; but nothing can be plainer than the language of that Act. It begins by defining the term “real property;” it then defines the term “personal property,” and it then proceeds to define the term “property,” which is to “include real property and personal property.” By the 16th section it is enacted, that where “property” (that is real or personal property) “shall become subject to a trust for any charitable or public purpose.”—Now perhaps this would be a charitable purpose, but it is certainly a public purpose, viz. to erect a church to which the public would have a right to go and receive religious instruction, and for the support of a minister to officiate in that church. If one were asked what a public purpose was, the first instance he would give would probably be, “to build a church and endow it.” The 16th section proceeds—“under any past or future disposition,” it shall be subject to “a duty at the rate of 10℥ per cent. upon the amount or principal value of such property.” I have no doubt that section was enacted for the purpose of removing any difficulty which might exist

1859.

IN RE  
WILLIAM  
PARKER.

1859.

IN RE  
WILLIAM  
PARKER.

by reason of the cases which have been referred to, where this Court and the Court of Exchequer Chamber took a somewhat different view from Vice Chancellor *Shadwell*.

It was argued that the 24th section of the Succession Duty Act shews that this is not the proper mode of levying the duty. It is only necessary to read that section to see that it has not the slightest application to this matter. It says, "a successor shall not be chargeable with duty in respect of any advowson or church patronage comprised in his succession, unless the same, or some right of presentation, or some other interest in or out of such advowson or church patronage, shall be disposed of by, or in concert with him for money." That section is dealing with an advowson properly so called—an existing thing. A portion of this money was to be applied in the erection of a church, and another portion was for the support of the clergyman; but the advowson or right of presentation is a totally different thing, it is a new species of property arising from the right which the testator's successor would have to appoint the clergyman to this church. He has no direct interest in the money expended on the church, nor in the sum for the support of the clergyman, but only the right to appoint. For these reasons I am of opinion that the Crown is entitled to judgment.

WATSON, B.—I am of the same opinion. I think that the case comes within the Legacy Duty Acts, and, in the view which I take, it is unnecessary to refer to the particular expressions used in them. It is argued that these Acts do not apply unless some person takes a beneficial or pecuniary interest in the bequest. There is nothing in the Acts to that effect, the charge is a general charge upon all legacies. If a person leaves a part of his property to his children, and a part to found an institution, the duty

equally attaches upon the money left. The 6th section has been altogether misconceived. It provides for the mode in which legacy duty is to be charged. Persons beneficially interested are to pay it, not their trustees. No doubt some difficulty has arisen from the decisions on the subject and the expressions used in them, but all difficulty is obviated by the Succession Duty Act. That Act renders all legacies liable to duty which were not liable under the Legacy Duty Acts. Whether the erection of a church can be called a charitable purpose or not, it is certainly a public purpose. There is no doubt that legacy duty is payable under one Act or the other. I think that it is payable under the Legacy Duty Act; but, if not, it is clearly within the Succession Duty Act.

1859.

IN RE  
WILLIAM  
PARKER.

Rule absolute.

ALLAWAY and Another v. WAGSTAFF.

June 16.

**D**ECLARATION upon an award, made by John Atkinson, Esq., deputy gaveller of the Forest of Dean, dated the 28th of May, 1858, made by him under the provisions of the 68th section of the 1 & 2 Vict. c. 43, being "An Act for

By "An Act for regulating the opening and working of mines and quarries in the Forest of Dean and Hundred of St. Briavels,"

1 & 2 Vict. c. 43, s. 68, it is enacted that every free miner and other person who is or may be entitled to any gale, pit, level or work within any enclosed land of the Hundred of St. Briavels, shall be, and he is hereby required to pay to the owners of any such enclosed lands full and fair compensation for any surface damage by the opening or sinking of any gale, pit, level or work therein or thereon, which compensation shall be ascertained by the gaveller or deputy gaveller. The plaintiff being the owner of a house standing on an open common within the Hundred, but adjoining on one side a yard of the plaintiff enclosed by a wall, the defendant, a free miner, in working his gale, got the coal from under the house, in consequence of which a subsidence took place, the foundation of the house sank and the walls cracked.

*Held*, that the defendant was liable to an action for causing a subsidence of the surface; but that the damage so done to the plaintiff's house was not "surface damage" within the meaning of the 68th section, and that the deputy gaveller had no jurisdiction to award compensation.

*Seemle*, that, the house standing on uninclosed land of the Hundred and being open on three sides, was not "inclosed land" within the meaning of the 68th section.

1859.  
 ~~~~~  
 ALLAWAY  
 v.  
 WAGSTAFF.

regulating, the opening and working of mines and quarries in the Forest of Dean and Hundred of St. Briavels, in the county of Gloucester," to recover the sum of 60*l.* awarded by him to the plaintiffs for surface damage to certain land, mill-house, and premises belonging to them by the working of the defendant's colliery under the mill-house and premises (a).

Pleas.—First: that the lands mentioned in the award were not enclosed lands within the meaning of the statute. Secondly: that the said alleged surface damage to the lands of the plaintiffs was not done or occasioned by reason or by means of the opening or working of the said gale therein or thereon, and that the said gale was never opened or worked in or on the said lands or any of them or otherwise than under the said lands. Thirdly: that the plaintiffs were not entitled to compensation for the said surface damage, according to the said statute; and that John Atkinson was not empowered under or by virtue of the said statute to ascertain or determine the said compensation. Fourthly: *nul tiel agard*. Fifthly: setting out the award, and alleging that it was void.

The plaintiffs took issue on all the pleas.


At the trial, before *Channell, B.*, at the Spring Assizes at Gloucester, it appeared that the plaintiffs, the Cinderford Iron Company, were the owners of a mill-house, inhabited by a miller, and premises, situate in Abbotts Wood in Ruspidge Common in the Forest of Dean. The defendant, a free miner, who carried on business as the Cinderford Bridge Colliery Company, in the course of working a gale in the Forest, got the coal under the plaintiffs' yard, and in front of their mill-house, the effect of which was that a subsidence of the surface took place, and the walls of the

(a) See the report of the argument on the demurrer to the 5th plea, *ante*, p. 307.

plaintiffs' house cracked. The plaintiffs called on the deputy gaveller to ascertain the amount of compensation to which they were entitled, and the deputy gaveller ultimately made the award which was set out in the 5th plea (see *antè*, p. 309). It was proved that the whole of the Forest of Dean is within the Hundred of St. Briavels; but the Hundred extends beyond the limits of the Forest. The plaintiffs' premises are in the Hundred of St. Briavels, and within the Forest of Dean; they consisted of the miller's residence, a yard and two small outbuildings. The fencing does not extend round the house; but there is a wall round the yard; the yard adjoins the North East end of the house, and the outbuildings look into the yard. The Cinderford Bridge Colliery is on Crown land, about 200 yards from the plaintiffs' house, separated from it by the enclosed lands of other proprietors. The damage in respect of which the award was made consisted of fissures in the walls of the house. There were deep cracks in the floor of the kitchen, so that a stick could be thrust to some depth into the soil between the stones. The plaintiffs' house had been built in 1836.

Upon this evidence the learned Judge directed a verdict to be entered for the plaintiffs, reserving leave to the defendant to move to enter a verdict in his favour.

*Henry James*, in Easter Term, obtained a rule nisi to enter a verdict for the defendant on the grounds that the deputy gaveller had no power or jurisdiction to make the award declared upon; that the damage sustained by the plaintiffs was not surface damage within the statute; that the house, &c., damaged were not inclosed lands, and were not in the Hundred of St. Briavels but within the Forest of Dean; and that the declaration was not proved by the award.

1859.  
  
 ALLAWAY  
 v.  
 WAGSTAFF.

1859.  
ALLAWAY  
v.  
WAGSTAFF.

*Pigott*, Serjt., and *Phipson* shewed cause (a) and *Manisty* and *Henry James* were heard in support of the rule.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

WATSON, B.—This was an action on an award, made by the deputy gaveller of the Forest of Dean, for non-payment of the sum awarded. The case was tried at the last Gloucester Assizes before my brother *Channell*, when a verdict was taken for the plaintiffs with liberty to the defendant to move to enter a nonsuit or a verdict for the defendant. The case was argued before us this Term. The question was whether the deputy gaveller had jurisdiction to make this award. The plaintiffs were the owners, not the occupiers, of a house and yard standing on uninclosed land, in the hundred of St. Briavels, in the Forest of Dean. The defendant was a free miner of the Hundred, and, as such, occupied and worked a colliery in the Forest of Dean, and in the course of working he worked out the coal which belonged to him, by outstroke, to and under the plaintiffs' house and premises, and thereby left them without supports. The plaintiffs' house and land under it were cracked and injured by the subsidence of the soil. The plaintiffs called in the deputy gaveller, who made an award of the amount sought to be recovered.

The objection raised by the defendant was that the award was void, as not within the powers of the deputy gaveller. This turns on the true meaning of the act of parliament 1 & 2 Vict. c. 43, entitled "An Act for regulating the opening and working of mines and quarries in

(a) May 31. Before *Pollock*, C. B., *Martin*, B., *Watson*, B., and *Channell*, B.

the Forest of Dean and the Hundred of St. Briavels in the county of Gloucester" (a). The 68th section is the clause on which this question turns, by which it is enacted, "That every free miner and other person who is or may be en-

1859.

ALLAWAY

v.  
WAGSTAFF.

(a) The learned Judge then went through the several provisions of the Act, as follows:—

The Act recites that the Queen, in right of her Crown, is seised of the soil of the Forest of Dean, and of all mines and minerals within or under the Forest, subject to certain alleged rights of common and other rights claimed in or over the same or some part thereof; and is also seised of divers inclosures within and upon the Forest, freed and discharged from all claims so long as they remain so inclosed. And in addition to the mines and minerals within or under the Forest, her Majesty is, *or claims to be seised of all other mines and minerals which are within or under any part of the Hundred of St. Briavels*, except such mines as have been granted by the Crown and still remain not re-conveyed. And that certain privileges were claimed by certain persons in the Hundred of St. Briavels, calling themselves free miners, to open mines and quarries in the open lands of the Forest; and also to open mines in all lands within the said Hundred of St. Briavels (except in churchyards, gardens and orchards, and in such inclosures as have been made by the Crown, under 20 Car. 2, c. 3, and 48 Geo. 3, c. 72, and except in lands within or under which the mines and minerals have been granted to any subject), and to work the mines and quarries ac-

cording to certain alleged customs: And that the customs were undefined and that it was expedient to amend the same, and to enable the free miners to get the deep coal; and that difficulties had arisen as to ascertaining and collecting the share dues, rents and royalties payable to her Majesty, and that disputes had arisen between free miners and others touching the working of the mines: And that there were officers called the gaveller and deputy gaveller: It was enacted that for these purposes certain Commissioners should be appointed. Sections 1 to 12 regulate the appointment, oath and meetings of the Commissioners. Section 13 vests the office of gaveller in the First Commissioner of the Woods and Forests. By section 14, free miners are persons who are inhabitants of St. Briavels, who have worked a year and a day in mining. Section 15 contains a similar provision as to quarrymen. By section 16, the gaveller or deputy gaveller is to make a register of free miners. The following sections to 22 are for the regulation of free miners, and of appeals from the decisions of the gaveller or deputy gaveller. Section 23. Gales to be granted to free miners, who may sell, assign or dispose of the same. Section 24. Commissioners to make an award and to set out gales. Section 29. Commissioners

1859.  
  
 ALLAWAY  
 v.  
 WAGSTAFF.

titled to any gale, pit, level or work within any inclosed land of the Hundred, shall, and he is hereby required, to pay to the owner of any such inclosed lands a full and fair compensation in money for any surface damage" by "the opening or working any gale, pit, level or work therein or thereon, which compensation shall be ascertained and determined" by the Commissioners till making the award, and by the gaveller or deputy gaveller after making the award; the compensation to be paid within ten days after making the award. No person to proceed in the opening or working of any gale till compensation for surface damage is paid. By section 69, no steam engine or dwelling house is to be erected in the inclosed land of the Hundred without consent of the owner.

It was argued, on behalf of the plaintiffs, first, that the place was within the jurisdiction of the deputy gaveller. We think it is within the Hundred of St. Briavels, and therefore it is within the limit of the jurisdiction of the deputy gaveller. Indeed, the defendant, whatever he did at the trial, did not, as we understood, contend to the contrary in the course of the argument.

to make rules how gales are to be worked, and breach of rules to work a forfeiture. Section 31. After award made customs to cease. Sections 41 to 46 are clauses respecting the settlement of rent to be made by Commissioners. Section 47. *In case of difference as to rent, the dispute to be settled by an arbitrator to be appointed by the gaveller or deputy gaveller.* Section 48. *The arbitrator to have power to examine witnesses and administer an oath.* Section 52 provides for the recovery of the money awarded. Sections 53 to 63 regulate the grant and assignment of gales. Section 64. No gale to be granted

under inclosed lands of the Queen—not to prevent free miners from working gale under such inclosed lands, so as no damage be done to such inclosed lands or the fences, or trees. Section 65. Air shafts may be granted and sunk in the Queen's inclosures. Section 66. *Commissioners may hear and determine questions respecting the working and extent of gales—empowered to hear evidence and administer an oath.* Section 67. One half of galeage rent in the Hundred in future to be paid to owner of inclosed land. In case of dispute, to be decided by arbitrator appointed by the gaveller or deputy gaveller.

But it was contended, on the part of the defendant: first, that this house and yard, standing on uninclosed land of the Hundred and open on three sides to it, was not inclosed land within the meaning of the 68th section of the Act. Secondly, that this damage arising to the house and land by sinking, caused by improper working, was not within the meaning of the 68th section of the Act, and that the injury was not surface damage but permanent damage to the house and land. No doubt, a house is inclosed land in one sense, but it is difficult to say that it is so within the meaning of this Act, which gives power to open mines and work the minerals on such land.

But, without putting our decision on this point, it is sufficient to say that this matter was not within the jurisdiction of the deputy gaveller. The free miners have the power to open mines within the Hundred, and work mines and quarries therein; that is to say, to sink shafts, raise the minerals, make heaps and roads, and do all other acts to work mines and quarries on the land (except erecting steam engines and dwelling houses without leave of the owner). This working the miners may lawfully do. There is no provision in the act of parliament to enable the free miners to leave the soil without support so as to cause a subsidence, nor is there any clause from which such a licence can be inferred. It follows that a free miner, whether working the coals under inclosed land from shafts sunk therein, or by outstroke from other land, and causing a subsidence, to the damage of the owner of the land, would be liable to an action: *Humphries v. Brogden* (a). We think that the 68th section is confined to the assessment of compensation for the damage done to the surface, and sinking shafts and making roads, &c. on the surface, in exercise of the powers granted, and not to enable the gaveller to try the question whether the defendant by his acts is liable to pay damages, and then to

1859.

ALLAWAY

v.  
WAGSTAFF.

(a) 12 Q. B. 739.

1859.

ALLAWAY

WAGSTAFF.

award, first, the damage done to the tenant, and, secondly, the damage done to the reversioner, which is, in fact, trying the cause. No power is given to summon witnesses or to administer an oath. Contrasting that provision with the sections above referred to, where the Commissioners and the arbitrator to be appointed by the gaveller in certain cases have the power to examine witnesses and administer an oath, it would appear that he has not the means of inquiring into and deciding such a question.

The surface damage, on the other hand, that is, injury to crops or destruction of grass, is a mere matter of ocular observation and computation. The computation can be made and the amount of damage ascertained and determined by the view of the gaveller. Surface damage, again, must mean damage to the surface. The expression "surface damage" is a term well known in the north of England in the Colliery districts, it is damage to the crops by using the surface, or by the smoke coming from the colliery works, or pit heaps, in respect of which compensation is payable under leases, or reservations of coal, or where lords work coal by custom under copyhold lands. It is difficult to say that the injury to the foundations of a house extending to the walls and roof of the house, or the subsidence of the soil partially or wholly destroying the future fertility of the soil, is a surface damage: it may be damage to the house and land, but not surface damage. Again, the clause in this same section, which prevents a person who has neglected or refused to pay the compensation awarded, from continuing his working until the compensation is paid, applies more to the case of damage to the land, by working and getting the coal therein, than to injury by reason of leaving the land without support.

The decided cases seem to support this view. *Smart v. Morton (a)*, where the owner of land and coal conveyed

(a) 5 E. & B. 30.

the land, with reservation of the coal and power to get and win the same, with a covenant that if the covenantor at any time should sink, dig for, work, win or get the coal in any part of the premises, he should pay such sum of money as should amount to treble the damages, loss or prejudice which the covenantee should sustain by reason of such digging, working, sinking or breaking of ground, wayleave or other matter or thing used or exercised in working or loading the coal there. The Court of Queen's Bench thought that this clause extended only to the proper working the coal on the land, and not to injury by reason of depriving the plaintiff's land of support. Lord *Campbell* there says:—  
 “The right to compensation may well be contemplated as extending only to injuries which may arise from mining, the mining being carried on in such a manner as that the surface is still left to enjoy a sufficient support.” Again, the case of *Harris v. Ryding* (a) bears strongly on this point. There a person, owner of land and coal, conveyed the land, reserving the coal and right to win and get the coal, making a fair compensation to the grantee of the land for the damage to be done to the surface of the said premises and the pasture and crops growing there; the Judges expressed an opinion that such covenant was for compensation for acts done on the surface of the land, all these things being authorized by the deed, and did not extend to damages by reason of the improper working of the coals and injuring the land by subsidence.

These decisions are very strong authorities in support of our judgment. It is true the decisions there turned upon the true construction of the respective deeds, but the section of the act of parliament is for the same purpose as the provisions in those two deeds. In the Act, as in the deeds, provision is made for compensation to persons whose land

(a) 5 M. & W. 60.

1859.

ALLAWAY

v.  
WAGSTAFF.

1859.  
 ~~~~~  
 ALLAWAY  
 v.  
 WAGSTAFF.

had been injured by the exercise of the power of working. For these reasons we think that the verdict should be entered for the defendant, and therefore the rule must be absolute.

Rule absolute.

June 14.

BURNABY v. BARSBY.

By indenture, dated in 1822, B., in consideration of 30*l.*, conveyed a house to C. and his heirs, to the use of himself for life, with remainder to the use of N. and E. (who were overseers of the parish of H.), their heirs and assigns, for ever; and it was declared that the overseers paid the 30*l.* out of parish monies, and that the premises were conveyed to them in trust to permit the same to be used as a poor house to place paupers therein belonging to the parish of H.:—*Held*, that the conveyance was not void under the statutes of mortmain.

**T**HIS was an action of ejectment to recover possession of a cottage and orchard, garden and premises, at Hungarton, in the county of Leicester.

At the trial, before Lord *Campbell*, C. J., at the Leicester Spring Assizes, it appeared that, prior to 1822, the premises in question were in the possession of one John Barsby, and that by indentures of lease and release, dated the 2nd of February, 1822, made between the said John Barsby and Sarah his wife of the first part, Francis Nedham and George Eaglesfield, overseers of the poor of the parish of Hungarton, and Samuel Woodford, churchwarden of the same parish, of the second part, and William Carver of the third part; reciting that the said F. Nedham, G. Eaglesfield and S. Woodford had contracted with John Barsby for the absolute purchase of the messuage and premises therein described, subject to the estate for life of the said John Barsby and Sarah his wife; In consideration of the sum of 30*l.* (the purchase money) to John Barsby paid by F. Nedham, G. Eaglesfield and S. Woodford, and of 5*s.* by Carver; The said John Barsby and Sarah his wife, granted, bargained, sold, released, and confirmed to Carver, his heirs and assigns, the messuage, garden and premises, to hold the same to the use and behoof of the said John Barsby and Sarah his wife for and during the term of their natural lives, subject to the proviso thereafter contained; and


from and immediately after the decease of the survivor of them, to the use and behoof of the said F. Nedham, G. Eaglesfield and S. Woodford, their heirs and assigns for ever. Proviso: that it should be lawful for the said F. Nedham, G. Eaglesfield and S. Woodford, at any time during the lives of the said John Barsby and Sarah his wife, to enter upon and take possession of all or any part of the garden belonging to the said messuage, for the purpose of making and building thereon any house or houses for the use of the parish of Hungarton, without making any further acknowledgment or satisfaction for the same. And the said F. Nedham, G. Eaglesfield and S. Woodford did declare that the said sum of 30*l.*, the consideration money, was part of the monies of and belonging to the inhabitants of the said parish of Hungarton, and that the messuage and premises conveyed to F. Nedham, G. Eaglesfield and S. Woodford, their heirs and assigns, were so conveyed in trust only that they should permit the premises thereby granted to be used and enjoyed as a poor or parish house, to place such pauper or paupers therein of or belonging to the parish of Hungarton for the time being; or to any other use or purpose, as the churchwardens and overseers of the poor for the time being, or the major part of them, with the consent and approbation of the majority of the parishioners and inhabitants of the said parish, assembled at a parish or vestry meeting, should think fit. The plaintiff claimed by a conveyance from the parish officers, dated the 3rd of September, 1857. John Barsby remained in possession till his death in 1843, and Sarah his wife till her death in 1848. The defendant's counsel objected that the conveyance of 1822 was void under the statutes of mortmain. The learned Judge directed a verdict for the claimant, reserving leave to the defendant to move to enter a verdict for him.

*Field*, in Easter Term, having obtained a rule nisi accordingly.

1859.

BURNABY

v.  
BARSBY.

1859.  
  
 BURNABY  
 v.  
 BARSBY.

*Mellor and Bell* shewed cause (a).—The conveyance is not void under the statutes of mortmain. The 9 Geo. 2, c. 36, s. 1, enacts that no manors, lands, &c., shall be given, granted, aliened, &c., or otherwise conveyed or settled, to or upon any person or persons, bodies politic or corporate or otherwise, for any estate or interest whatsoever, &c., in trust or for the benefit of any charitable uses; unless such gift, conveyance, &c., be and be made by deed, indented, sealed and delivered, &c., and inrolled, &c., and unless the same be made to take effect in possession for the charitable uses intended immediately from the making thereof, and be without any power of revocation, reservation, &c., for the benefit of the donor or grantor, or of any persons claiming under him. By section 3, grants made in any other manner than directed by the Act are to be absolutely void. The 9 Geo. 4, c. 85, s. 1, provides that where lands have been purchased for a valuable consideration in trust or for the benefit of any charitable uses whatsoever, and such full consideration shall have been actually paid, every deed for the purpose of conveying such lands for the benefit of such charitable uses (if made to take effect in possession for the charitable uses intended immediately from the making thereof, and without any reservation for the benefit of the grantor), shall be good. The question however does not turn upon these Acts, because the conveyance is not in trust for “a charitable use.” The 59 Geo. 3, c. 12, s. 8, enacts, that in any parish not having a workhouse, &c., the churchwardens may purchase or take on lease any ground within the parish for the purpose of such building, which, by section 17, is to be conveyed to the churchwardens and overseers of the poor of such parish and their successors in trust for the parish. Previously to that statute, by the 9 Geo. 1, c. 7, s. 4, for the greater ease of parishes and the

(a) May 31. Before *Pollock*, C. B., *Martin*, B., *Watson*, B., and *Channell*, B.

relief of the poor, the churchwardens and overseers were empowered to purchase or hire any house or houses in the parish for the lodging, keeping, maintaining and employing of the poor. [*Martin, B.*—The conveyance is to the churchwardens and overseers, their heirs and assigns; by the 59 Geo. 3, c. 12, s. 17, it should have been to them and their successors.] The conveyance is good under the earlier statute. There was no charitable gift. There was an actual purchase, and the money was paid by the parish, for parish purposes, out of parish funds.

*Field*, in support of the rule.—The power to purchase lands given to parish officers by the 8th section of the 59 Geo. 3, c. 12, is subject to the provisions of the Mortmain Acts. By the 7 & 8 Vict. c. 101, s. 73, it is enacted, that in all cases where any messuages, lands or hereditaments, or any estates or interest therein, have or hath been conveyed or assured, either gratuitously or for valuable consideration, to or in trust for the churchwardens and overseers of the poor, &c., for the purpose of providing a workhouse, &c., for the accommodation of the poor, &c., any such conveyance shall be good *notwithstanding that such conveyance hath not been enrolled* pursuant to 9 Geo. 2, c. 36. That statute dispenses with one only of the requisites of the Mortmain Acts. It shews what construction the legislature put upon the 9 Geo. 2, c. 36. [*Pollock, C. B.*—It is the province of Courts, and of the Courts only, to construe statutes.] Those uses are deemed charitable in the superior Courts which the 43 Eliz. c. 4 enumerated, or which are deemed within its spirit—such as “bequests for the use of aged poor and impotent people.” Therefore providing lodging for the poor is a charitable use within the Mortmain Acts (*a*). [*Martin, B.*—It might be different

1859.

BURNABY

v.  
BARSBY.

(*a*) On this point he referred to Chitty's Statutes, vol. 1, p. 426, note *a*, and p. 428, note *a*, and cases there cited.

1859.  
 BURNABY  
 v.  
 BARSBY.

if it were in the way of charity. Here the purchase was made by the overseers for the purpose of providing lawful relief.] The argument on the other side is, that 59 Geo. 3, c. 12, s. 8, takes purchases of ground for workhouses out of the statutes of mortmain. The answer is, that, however that might be if the deed had operated under the statute, in the present case the power in that statute is not pursued; and therefore the deed is left as before the statute, and at the time of the passing of the 7 & 8 Vict. c. 101, s. 73, would have required enrolment. [*Pollock, C. B.*—Before the 59 Geo. 3, c. 12, parish officers might have purchased houses for lodging the poor and caused them to be conveyed to trustees; or they might have acquired by gift, unless the case was within the statutes of mortmain. The effect of the 8th section was to empower them to take as other people could. *Watson, B.*—The word “may” means “without reference to the Mortmain Acts.”]—He referred also to *The Churchwardens of St. Nicholas Deptford v. Sketchley (a)*.

*Cur. adv. vult.*

*Watson, B.*, now said.—This was an action of ejectment. At the trial, before Lord *Campbell, C. J.*, a deed was put in conveying the land in dispute to certain trustees, for the benefit of the poor of the parish, for a poorhouse. The sole question raised was whether this deed was rendered void by the statutes of mortmain. The 9 Geo. 2, c. 36, and the 9 Geo. 4, c. 85, were cited to shew that it was so. It was argued that it was a charitable use within those statutes. The defendant's counsel, in the course of the argument, was asked by the Bench whether there were any authorities to shew that a grant of land to churchwardens and overseers of a parish for the purpose of building a workhouse, or to trustees for that purpose, was a conveyance

(a) 8 Q. B. 394.

to a charitable use within those statutes; and no authority could be cited upon that point, because no authority exists. The statutes 59 Geo. 3, c. 12, s. 8, and the 9 Geo. 1, c. 7, enabled parishes to build workhouses, to take lands by way of lease or by conveyance in fee. They had the right, according to the terms of the act of parliament, of selling those lands when they were no longer useful for the purpose (a). We are of opinion, after looking through the statutes, that this does not come in any way within the description of "charitable uses," as enumerated in the statute 43rd of Elizabeth. The churchwardens and overseers purchased for a limited purpose with a power of conveying away; the land was not to remain to them for ever: and there is nothing in the statute of Elizabeth to lead to the conclusion that the use would be a charitable use within the meaning of that Act. The purchase was under the immediate direction of an act of parliament, which says it shall be lawful for churchwardens and overseers to purchase and to sell again. For these reasons we think it does not fall in any way within the meaning of the statutes of mortmain. Therefore the rule must be discharged.

1859.  
  
 BURNABY  
 v.  
 BARNBY.

Rule discharged.

(a) See 59 Geo. 3, c. 12, s. 9.

DICK v. ALEXANDRE TOLHAUSEN and ANNA his Wife. June 7, 1858.

**D**ECLARATION.—Henry Dick, by &c., his attorney, sues Alexandre Tolhausen and Anna (sued as Emily) his wife, who have been summoned &c.: For that the plaintiff,

Matter which affords ground for a writ of error cannot be pleaded in bar to an action on a judgment.

Therefore, where to an action against husband and wife, on a judgment against the wife, the defendants pleaded that she was covert when the action in which the judgment was recovered was commenced and thence until the judgment, and that her husband was not a party to the judgment or a defendant in the action:—*Held*, that the plea was bad.

1858.

**DICK**  
v.  
**TOLHAUSEN.**

heretofore, to wit on &c., in this Court, by the judgment of this Court, recovered against the said Emily 9*l.* 12*s.* 8*d.*, which judgment remains in force, &c.

Plea.—That at the time the action, in which the said judgment was so recovered, was commenced, and thence until the said judgment was so recovered as therein alleged, the defendant Anna was the wife of the defendant Alexandre Tolhausen; and that the last mentioned defendant was not any party to the said judgment or a defendant in the action in which the same was obtained.


Demurrer and joinder therein.

*Trevethyan*, in support of the demurrer.—The plea is bad, inasmuch as the subject-matter affords ground for a writ of error, and therefore cannot be pleaded in bar. In 2 *Wms. Saund.* p. 101 b., note, it is said that a writ of error may be brought in the same Court for an error in fact, “as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit.” Again, at p. 101 f., note, it is said, “If an action be brought against A. as a feme sole, who is in truth a feme covert, and she plead to issue as a feme sole, and afterwards judgment be given against her, and she be taken in execution, she and her husband together may bring a writ of error.” The law is stated in similar terms by *Blackstone*, J., in *Hatchett v. Baddeley* (a). And in *Maclean v. Douglas* (b) the Court refused to set aside a judgment entered up on a warrant of attorney given by a married woman, since she might reverse it by writ of error. A form of assignment of error in such case is given in *Tidd’s Forms*, p. 544, 8th ed. It is clear, therefore, that coverture at the time of action brought is ground of error. Then in *Com. Dig.* tit. “Pleader” (2 *W.* 39), it is laid

(a) 2 *W. Black.* 1079, 1082.

(b) 3 *Bos. & P.* 128.

down that a defendant cannot "plead in bar error in the original judgment." Again, tit. "Error" (D), it is said, "So error in the principal judgment is no plea in scire facias against the heir or bail." Also in Vin. Abr. tit. "Debt" (X), pl. 3, it is said, "In debt upon a judgment it is no plea that there is an error in the original process or record of the first judgment, for he is put to his writ of error for that." In *Horsy v. Daniel* (a) there was "judgment against baron and feme, executors, *quod recuperent debitum de bonis* (omitting *testatoris*) and damages *de bonis propriis* of the husband. And in debt upon this judgment, declaring of a *devastavit*, it was resolved that, though the first judgment be ill, yet it is well enough to maintain this action until it be reversed, for no advantage can be taken of the error while it remains unreversed." The principle which governs these cases is that, so long as the judgment remains in force, no new action can be brought for the same cause: *Higgins's Case* (b).

1858.  
  
 DICK  
 v.  
 TOLHAUSEN.

The Court then called on

*C. Pollock* to support the plea.—It does not appear by the declaration whether the wife was sued in respect of a contract made before coverture or during coverture. In Bac. Abr. tit. "Abatement" (G), it is said, "If a writ be brought against a feme covert as sole, she may plead her coverture; but if she neglect to do it, and there be a recovery against her as a feme sole, the husband may avoid it by writ of error, *and may come in at any time and plead it.*" The right of a husband to bring a writ of error is limited to cases where the plaintiff has elected to take the wife in execution. In *Hayward v. Williams* (c) "a feme was sued

(a) 2 Lev. 161.

(b) 6 Rep. 44. b.

(c) Style, 280.

1858.  
 ⏟  
 DICK  
 v.  
 TOLHAUSEN.

as a feme sole, but by the surname of her husband, she being then covert. The feme appears and pleads, and judgment is given against her, and the baron and feme join in a writ of error to reverse this judgment. The question was, whether the baron, who was a stranger to the record, might join in the writ to reverse the judgment. It was moved divers times, and the Court advised; and at last they said that a stranger to the record may not bring a writ of error to reverse it, but that is only where he may have another remedy to avoid the prejudice he may receive by it; but in this case the baron hath no other remedy, for his wife is taken in execution, and by this means he shall lose her society." When that case was argued on a previous occasion (a), *Roll*, C. J., said, "How can the baron bring a writ of error here, who is no party to the record, neither is chargeable by the judgment?" [*Watson*, B.—In *Chitty on Pleading*, vol. 1, p. 67, 7th ed., it is laid down that if the wife be sued alone upon her contract before marriage, she must plead her coverture in abatement, or bring error coram nobis. Here there is nothing to shew that she did not plead in abatement, and that the plea was found against her.]—He also referred to *Lean v. Schultz* (b).

POLLOCK, C. B.—We are all (c) of opinion that the plea is bad. The defendant may have liberty to amend; otherwise, judgment for the plaintiff.

Rule accordingly (d).

(a) *Style*, 254.

(b) 2 W. Black. 1196.

(c) *Pollock*, C. B., *Bramwell*, B., and *Watson*, B.

(d) This case was decided in Trinity Term 1858 (June 7), but its publication has been delayed in consequence of the rule not

having been drawn up; the Court having intimated to the defendants' counsel, that as another point in the same case stood in the paper for argument, he might, on its being heard, inform the Court whether or no he elected to amend.

1859.

LINDSAY and Others v. JANSON.

June 3, 7.

**D**ECLARATION on a policy of insurance, whereby the plaintiffs "caused themselves to be insured, lost or not lost, at and from Swan River to Mauritius, and for thirty days after arrival," upon any kind of goods; and also upon the body, tackle, apparel, &c., of and in the good ship or vessel called the "Shanghai," 4,500*l.* on ship so valued.—

The declaration, after setting out the policy, averred, that the ship sailed from the Swan River on the voyage, that the risk attached, and during its continuance and before thirty days after the arrival of the ship at Mauritius, it was by perils insured against wholly lost: that the plaintiffs were interested in the subject-matter of the policy to the value of the monies insured thereon, and that all conditions precedent, &c., had been fulfilled.—Breach: Non-payment.

Plea.—That after the said ship had sailed on her said voyage, and before the happening of the loss, the ship was unnecessarily delayed in the prosecution of the said voyage; and was improperly navigated and taken out of, and did then abandon, depart, and deviate from the course of the said voyage.—Issue thereon.

At the trial, before *Byles*, J., at the last Liverpool Spring Assizes, it appeared that in the year 1856 the barque "Shanghai" sailed from London for the Swan River. In the course of her voyage she met with tempestuous weather

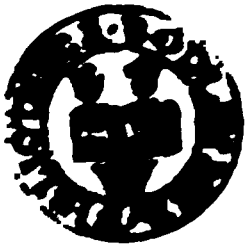
anchored at the Bell Buoy and remained there fourteen days, awaiting the arrival of money to pay a bottomry bond, at the expiration of which period she was wrecked.—*Held*, that it was a question of fact for the jury whether the ship had arrived at the Mauritius.

*Per Curiam*, the question is, whether it was an arrival at the place at which ships of her character ordinarily anchor.

Declaration on a policy of insurance on the barque "Shanghai," "from Swan River to Mauritius, and for thirty days after arrival," averring a total loss. Plea: that the ship was unnecessarily delayed and abandoned, and deviated from her voyage. It was proved that ships bound for the Mauritius loaded with cargoes, generally speaking, go into the harbour of Port Louis. If in ballast or seeking cargo, it is customary for them to anchor at the Bell Buoy, which is a buoy in the main ocean, a few miles from the harbour itself. The "Shanghai" having sailed in ballast from Swan River to the Mauritius on her arrival

1859.

LINDSAY

P.  
JANSON.

and was obliged to put into the Mauritius for repairs. The master gave a bottomry bond for 2000*l.*, payable within thirty days after the arrival of the vessel at Port Louis in the Mauritius. The vessel proceeded to Swan River, when the policy in question was effected. Having discharged her cargo, she sailed in ballast for the Mauritius, and arrived on the 14th January, 1857. She anchored at the Bell Buoy, where the master awaited the arrival of money to pay the bottomry bond. The vessel remained at the Bell Buoy until the 28th of January, when the usual signal was made from the shore of a change in the weather, and, whilst the vessel was proceeding out to sea, she parted her cable, struck on a coral reef and became a total wreck. The Bell Buoy is a buoy with a bell on the top of it in the open ocean, about a quarter of a mile from the shore. It lies off the mouth of a narrow channel leading to the harbour of Port St. Louis. The anchorage there is good, and in consequence of the prevailing trade winds is generally under the lee of the land. There was evidence that it was usual for vessels on their arrival at the Mauritius to anchor at the Bell Buoy, whether about to enter Port Louis or not; but it was said to be dangerous to remain there in the hurricane months, which are from December to April. There was some evidence that the harbour was not safe at such times. Vessels in ballast always anchored at the Bell Buoy in order to save the port dues. It is the common practice for ships arriving at the Mauritius that have to wait for pratique, for American whalers coming to sell their oil and get supplies, and for vessels seeking cargoes or calling for orders, to remain there. Pilots are taken on board there. Vessels coming to the Mauritius to land a small portion of their cargoes often discharge it there into lighters. It is common for ships to take on board or land passengers there at all seasons of the year. In answer to a question

put on cross-examination, one of the plaintiffs' witnesses, a captain who knew the harbour well, stated that he did not consider himself at sea if he anchored outside the Bell Buoy. The defendant's witnesses stated that they did not consider it as part of the harbour.

It was submitted on behalf of the defendant, first, that the vessel had not arrived at the Mauritius within the meaning of the policy: secondly, that she had stayed an unreasonable time outside the harbour so as to amount to a deviation. The learned Judge said, that the words in the policy "to the Mauritius" meant the same thing as the words in the bottomry bond "to Port Louis in the Mauritius;" because, if a vessel is bound to any country, it means bound to some port there; therefore the question was whether the Bell Buoy was part of the port of Port Louis. He expressed his opinion that, taking the evidence to be true, the question whether this vessel had arrived was one of law; but he left it to the jury to say, first, whether the Bell Buoy was part of the Mauritius: secondly, supposing it was not, whether there was an unusual and unreasonable delay, looking at the object which the master had in going there. His lordship at the same time intimated that in his opinion the vessel had arrived at the Mauritius, and that under the circumstances there was no unreasonable delay. The jury found a verdict for the plaintiffs on both points, and leave was reserved to the defendant to move to enter the verdict for him.

*Atherton*, in last Easter Term, obtained a rule nisi accordingly, or for a new trial, against which

*Wilde* and *Blackburn* now shewed cause.—First, the vessel had arrived at the Mauritius within the meaning of the policy. If that is question of law, the opinion of the learned Judge was in favour of the plaintiff; if it is a

1859.

LINDSAY

v.

JANSON.

1859.

LINDSAY  
v.  
JANSON.

question of fact, it was properly left to the jury, and they found that the Bell Buoy was part of the Mauritius. In the case of a policy on a vessel from a foreign port to London, if a question arose as to whether the vessel had arrived in London, that would depend on whether she had come to the place in the port of London, where it was usual for such vessels on such a voyage to remain. It is not requisite that the vessel should go into the docks. Here the only object of returning to the Mauritius was to pay the bottomry bond; and there was no reason why the vessel should enter Port Louis. Secondly, assuming that the Bell Buoy is not part of the Mauritius, there was no unusual or unreasonable delay so as to amount to a deviation. It is not the question whether it was prudent, with reference to the safety of the vessel, to anchor at the Bell Buoy at that season of the year; for the mere negligence of the master will not discharge the underwriters; but whether, looking at the surrounding circumstances, there was an unusual or unreasonable delay, and the jury have found that there was not.

*Atherton, Edward James and Mellish*, in support of the rule.—The Bell Buoy is no part of the harbour of Port Louis. The port is the place in which ships lie for taking in cargo, and lying within which they become liable to port dues. The captain, not being supplied with money to satisfy the bottomry bond, delayed going into the port as he should have done, in order that the time might not begin to run on the bond. The Judge should have directed the jury that anchoring outside the harbour was unreasonable, instead of telling them, as he did, that in determining the question they might consider the nature of the voyage and the object the master had in going there. The rule as to the construction of written documents is thus stated in *Nelson v.*

*Harford* (a): "The construction of all written instruments belongs to the Court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury." The moment the meaning of the terms of art is settled, the construction of the document is a matter of law for the Court. The Court must define what is arrival at the Mauritius. The Bell Buoy is in no sense the Mauritius. It is below low water mark on the main ocean. Every country is considered to terminate below low water in the main ocean, except in the case of bays, when a line must be drawn from headland to headland (b). [*Bramwell*, B.—Suppose a policy on a vessel bound for Deal. Your argument would shew that no vessel ever did arrive at Deal.] If she arrived off Deal that might be considered as an arrival at Deal, or she might be beached. The ship was entitled to complete her voyage. Suppose she had had a cargo, and had been insured till she had arrived at the Mauritius and anchored safely for twenty-four hours, "anchored safely" would mean anchored at the ordinary place within the harbour where vessels discharge. The assured might have selected any place within the harbour at which they might have anchored, but if the vessel had been lost twenty-four hours after her arrival at the Bell Buoy, the underwriters would have been liable (c). Therefore the underwriters had a right that she should proceed with all con-

1859.

LINDSAY

v.  
JANSON.

(a) 8 M. &amp; W. 806. 828.

(b) See *Regina v. Cunningham*, Bell C. C. R. 72.(c) On this point they referred to *Dickey v. The United Insurance Company*, 11 Johnson's (American) Reports, 358. In 1 Phillips on Insurance, p. 536, s. 969, the

rule is thus stated:—"The risk on a vessel under a policy to a place generally, without any provision as to her safety there, terminates on the vessel being safely anchored at her port of destination in the usual place and manner."

1859.  
 LINDSAY  
 v.  
 JANSON

venient speed to her place of destination, and that the risk should not be increased by delay in a dangerous position, such as the Bell Buoy was admitted to be during the hurricane months.—[*Wilde* referred to *Dalglish v. Brooke* (a).]

POLLOCK, C. B.—We are all of opinion that the rule must be discharged. The question is one of fact, and was answered by the jury as I should have answered it. It involves no proposition of law. Whether a vessel has arrived within a harbour is purely a question of fact; I do not think it can be compared to the question which frequently arises as to the meaning of the specification of a patent. The meaning of a specification is just as much a matter of law as the construction of a will is. But the present question is purely one of fact, as every other question must be which involves an inquiry as to time or place. In a question of time, the Judge may explain the meaning of terms, as mean time, or solar time, or central time (as in the case of railways which observe London time). Upon a point of that kind a Judge may be called upon to direct a jury. But this is a question of fact; and applying my own mind to it, I think that the vessel had arrived, and that there is no ground for disturbing the decision of the jury.

MARTIN, B.—I agree that the rule must be discharged. The vessel was insured from Swan River to the Mauritius, and for thirty days after arrival. The facts are these:—The Mauritius is an island having one port, viz. St. Louis. It appears that ships coming loaded with cargoes, generally speaking, go into the harbour; if in ballast, seeking cargo, it is customary for them to anchor at the Bell Buoy a few miles from the harbour itself. In the present case there was a bonâ fide intention to go and remain there for that

(a) 15 East, 295.

purpose alone. It is clear that this was an arrival at the Mauritius; it was an arrival at the place at which ships of her character ordinarily anchor. Underwriters must take notice of the usual practices prevailing in such cases.

1859.

LINDSAY

v.  
JANSON.

BRAMWELL, B.—I am of the same opinion. There are two questions—one of law, the other of fact. If the plaintiff had demurred to a plea setting out the circumstances leading to the inference that the vessel had arrived, no judgment could have been given whether there was an arrival at the Mauritius or not, because we could not know the fact. A question as to the identification of a place, or a person named, is a question of fact. Thus, it was a question of fact here, what was the Mauritius. It is said that there cannot be two sorts of arrival at the Mauritius; that some vessels do not arrive until they get into port. The argument is ingenious but fallacious. A similar argument would apply to vessels coming to London. Probably an oyster smack would not be said to arrive till she comes to the point where she lands her cargo. It may be an arrival when she gets to that place where vessels of her class usually anchor. I agree in the correctness of the proposition of law stated by my brother *Martin*, and wholly approve of the principles upon which the jury decided the question.

WATSON, B.—This is a mere question of fact. The question is, what is the Mauritius? That depends on the usage—not upon the question of high or low water mark. The harbour is the port of destination for vessels bound to the Mauritius; but it was proved, that arrival in the harbour is not the only sort of arrival at the Mauritius.

Rule discharged.

1859.

May 26.

JONES v. WILLIAMS.

Brewing utensils, hops, &c., having been seized under a warrant of execution from a County Court against the goods of R., were claimed by one J. On the 5th of October the bailiff caused an interpleader summons to be issued, calling on the parties to appear on the 18th, when the claim would be adjudicated upon. The County Court judge decided that the goods were the property of J. The goods having been given up, J. commenced an action against the execution creditor for damages, for wrongfully depriving him of the possession of the goods, by means whereof he was prevented from carrying on his trade

as a brewer, alleging special damage. The Court refused to interfere to stay the proceedings at the instance of the defendant.

*Semble*, that the power to stay proceedings, under the 9 & 10 Vict. c. 95, s. 118, is confined to actions brought before the adjudication by the County Court judge.

*Semble*, that, if the proceedings on the interpleader summons constituted a defence to the action, it should have been pleaded.


**T. JONES** had obtained a rule calling on the plaintiff to shew cause why all proceedings in this action should not be stayed.

It appeared from the affidavits, that the defendant, Williams, having recovered judgment against one Read in the County Court of Cheshire, holden at Birkenhead, a warrant of execution was issued from the county of Lancashire, holden at Liverpool, under which some brewing utensils, hops, &c., and ale were seized upon the premises in which Read was carrying on business as a brewer, his name appearing over the door as licenced owner. Shortly after the execution had been levied, the plaintiff Jones claimed the goods seized,—and the brewing utensils, hops, &c., as his own, having been purchased by him; and, as to the ale, that it had been manufactured by him and his partner Read, but that Read, being indebted to the partnership, had no interest in the ale. On the 5th of October the bailiff caused to be issued out of the County Court of Lancashire an interpleader summons, reciting that Jones had made a claim to the goods, and calling on Williams to appear at a court to be holden on the 18th of October, when the said claim would be adjudicated upon. On the hearing of the interpleader summons, the judge decided that all the goods claimed by Jones, except the ale, were his property, and should be delivered up to him; but as to

the ale the claim was dismissed. After the decision of the case the bailiff withdrew, an arrangement having been made with him that 3*l.*, the supposed profit on the ale, should be paid by Jones into his hands. A few days afterwards Williams was served with the writ of summons in this action; and a declaration was subsequently delivered, which alleged "that the defendant wrongfully deprived the plaintiff of the use and possession of his goods, to wit, household furniture, brewing utensils, &c., hops, isinglass and malt. By means of which premises, and for the want of the said goods, the plaintiff was hindered and prevented from exercising and carrying on the trade and business of a brewer which he before then had used and carried on upon certain premises in which the said acts were committed; and was prevented from brewing and making divers large quantities of ale, porter and beer which he might and otherwise would have made, and from selling and disposing of the same at large profits; and thereby the plaintiff lost divers customers, to wit Felix M'Cowill, &c., who had been used to deal with him in his said trade, and who would otherwise have continued to do so; and other persons, to wit John Sharpe, &c., who would have become customers and dealt with the plaintiff, refused to do so. And thereby the plaintiff was deprived of divers gains," &c.

The defendant Williams swore, that he never personally interfered in the levy or the proceedings thereunder, but that the levy and the whole management of the execution were solely left to the bailiff of the County Court: that the goods were never removed from the premises but remained there as before: that he never interfered in stopping the trade or business of the brewery, but he was informed, and believed, that it went on as usual; and that at the hearing of the interpleader no claim was made in respect of any damages for the seizure of the goods, and after the

1859.  
JONES  
v.  
WILLIAMS.

1859.  
  
 JONES  
 v.  
 WILLIAMS.


decision of the Court he never in any way interfered with the bailiff or detained the goods.

*Milward* now shewed cause.—By the 9 & 10 Vict. c. 95, s. 118, if any claim be made to, or in respect of any goods taken in execution under the process of a County Court, by any person not being the party against whom such process has issued, it shall be lawful for the clerk of the Court, upon application of the officer charged with the execution of such process, “to issue a summons calling before the said Court as well the party issuing such process as the party making such claim, and thereupon any action which shall have been brought in any of her Majesty’s superior Courts of record, or in any local or inferior Court, in respect of such claim, shall be stayed; and the Court in which such action shall have been brought, or any Judge thereof, on proof of the issue of such summons, and that the goods, &c., were so taken in execution, may order the party bringing such action to pay the costs of all proceedings had upon such action after the issue of such summons out of the County Court; and the judge of the County Court may adjudicate upon such claim and make such order between the parties in respect thereof, and of the costs of the proceedings as to him shall seem fit.” First, the power to stay does not apply to actions brought after the adjudication in the County Court. Secondly, if the power to stay applies to such actions, inasmuch as the present action is for an injury to the plaintiff’s business, by removing his goods and stopping his trade, while the claim before the County Court was only in respect of the property in the goods, this cause of action is not one upon which the County Court judge has adjudicated. The cases of *Foster v. Pritchard* (a) and *Mercer v. Stanbury* (b) are authorities that under such circumstances proceedings

(a) 2 H. & N. 151.

(b) 2 H. & N. 155.

will not be stayed. *Winter v. Bartholomew* (a) arose under the Interpleader Act (1 & 2 Wm. 4, c. 58, s. 6), for the relief of sheriffs, which differs from the 9 & 10 Vict. c. 95, s. 118, inasmuch as it empowers a Judge of the superior Courts not only to deal with the question of property, but to make such rules and decisions as shall appear to be just, according to the circumstances of the case. In *Jessop v. Crawley* (b), where there was an order to stay proceedings under the 9 & 10 Vict. c. 95, it was not suggested that there was any damage beyond that of entering the premises to seize the goods. [*Martin, B.*—Is there any instance where a plaintiff has been held entitled to recover damages in trover beyond the value of the goods?] In *Bodley v. Reynolds* (c), it was held that damages might be given for seizing carpenters' tools, if specially laid in the declaration. The special damage there laid was, that the plaintiff was hindered from working at his trade. The same doctrine was recognized and acted upon by the Court of Queen's Bench, and afterwards in the Court of Exchequer Chamber, in *Wood v. Bell* (d). In that case there were no pleadings, but if there had been the declaration would have naturally been in trover. [*Martin, B.*, referred to *Reid v. Fairbanks* (e), Sedgwick on Damages, p. 78, c. 3, and Mayne on Damages, p. 209.] In *Davis v. Oswell* (f), *Parke, B.*, ruled that special damage might be recovered in trover if laid in the declaration. Here the cause of action in the declaration is, that for want of the goods seized the plaintiff was hindered and prevented from carrying on his trade of a brewer. In *Cater v. Chignell* (g), after a decision of the County Court judge in favour of the claimant, it was held,

1859.  
  
 JONES  
 v.  
 WILLIAMS.

(a) 11 Exch. 704.

in error, 6 E. &amp; B. 355.

(b) 15 Q. B. 212.

(e) 13 C. B. 692.

(c) 8 Q. B. 779.

(f) 7 C. &amp; P. 804.

(d) 5 E. &amp; B. 772. See S. C.

(g) 15 Q. B. 217.

1859.  
 JONES  
 v.  
 WILLIAMS.

that the claimant was entitled to proceed in an action for special damage by breaking and entering his premises. In *Tinkler v. Hilder* (a), the Court seemed to be of opinion that the question of damages might come within the jurisdiction of the County Court judge.


*T. Jones*, in support of the rule.—The claim in the declaration is a claim in respect of the goods. The true construction of the 9 & 10 Vict. c. 95, s. 118, is that given to it by *Parke, B.*, in *Tinkler v. Hilder* (a). [*Martin, B.*—The power to stay proceedings under that section seems to be confined to cases where the action is brought before the adjudication by the County Court judge.] Under the Interpleader Act, it is clear that the Court will stay an action brought by a claimant who has succeeded in establishing his claim: *Winter v. Bartholomew* (b). The Courts have an absolute jurisdiction, which they will exercise. The Act is purely permissive: the party is not bound to make a claim, but if he does so, he must content himself with the remedy which the legislature has provided for him. The expression, “every action which shall have been brought,” refers to actions brought at the time of the application to stay. [*Martin, B.*—If the adjudication by the County Court judge constitutes a defence it ought to be pleaded.] That construction would not carry into effect the object of the legislature, viz. to prevent any action being brought. [*Watson, B.*—The words “thereupon any such action which shall have been brought,” refer to suits then existing.] In *Abbott v. Richards* (c), which was a case under the Interpleader Act, *Rolfe, B.*, doubted whether the legislature intended that there should be any interpleader at all, unless the interpleader disposed of everything, and he

(a) 4 Exch. 127.

(b) 11 Exch. 704.

(c) 15 M. & W. 194, 197.

pointed out that there was no analogy for allowing a party to split his claim into two parts. The same principle of construction applies to the provision now under consideration. It may well be that, if there is a claim to damages otherwise than "in respect of the goods," the plaintiff may be at liberty to go on. In *Cater v. Chignell* (a) the Court held that the plaintiff was not entitled to proceed for special damage by taking the goods. [*Martin, B.*—That case is against you. Mr. *Willes* merely said that he would be content that the averment of special damage in the second count should be transferred to the first.]

1859.  
  
 JONES  
 v.  
 WILLIAMS.

*POLLOCK, C. B.*—We are all of opinion that the rule must be discharged. The construction is far too doubtful to warrant us in staying the proceedings. It may be fairly contended that the remedy in the superior Court is intended to extend to all complaints connected with the seizure of the goods, but that the power of the County Court judge, who cannot inquire where title to land is in question, is less extensive.

*MARTIN, B.*—I am of the same opinion. We ought to put such a construction on the language of the legislature as gives full effect to the expressions used, but I think that this is a doubtful matter. My impression is, that the power to stay proceedings extends only to actions brought before the interpleader summons in the County Court, and that the question as to the effect of the adjudication on any action afterwards brought must be raised by plea and not by an application to stay the proceedings. The Court does not interfere summarily except the case is clear.

*WATSON, B., and CHANNELL, B., concurred.*

Rule discharged without costs.

(a) 15 Q. B. 212.

1859.

June 8.

BROOKS v. HODGKINSON and BUTT.

A defendant who is taken in execution under a writ of ca. sa. issued on a judgment for less than 20*l.*, without the order of the Judge who tried the cause, may maintain an action of trespass against the plaintiff and his attorney, although the writ has not been set aside.

**T**RESPASS for assaulting and imprisoning the plaintiff.

**Plea.**—That before the committing of the trespasses the defendant, W. Hodgkinson, by the judgment of the Court of Queen's Bench, recovered against the now plaintiff 13*l.* 2*s.*, whereof the now plaintiff was convicted, &c.; and thereupon, the said judgment being in full force, and the said amount being justly due and remaining unpaid, afterwards and before the said time when, &c., the said W. Hodgkinson, for having satisfaction of the said judgment, by the defendant R. Butt, as his attorney, caused to be issued out of the Court of Queen's Bench a writ of *capias ad satisfaciendum*, directed to the sheriff of Hertfordshire, &c.—The plea set out the writ, which commanded the sheriff to take the plaintiff to satisfy the sum of 13*l.* 2*s.* and interest, &c., and justified the imprisonment of the plaintiff under the writ.

**Replication.**—That the judgment was for a sum less than 20*l.*, exclusive of costs, and was recovered after the passing of an act of parliament passed, &c. (7 & 8 Vict. c. 96), in an action brought by the defendant, Hodgkinson, for the recovery of a debt due to him from the now plaintiff. That the judgment so recovered was, duly and in accordance with the rules and practice of the Court of Queen's Bench, for want of an appearance in the said action by the now plaintiff; and no order to take or detain the now plaintiff in execution upon the said judgment was ever at any time made under or in pursuance of the proviso in that behalf contained in the said statute.

**Rejoinder.**—That the said writ of ca. sa. at the said time

when &c., was in full force and was not then or at any other time reversed, annulled, or set aside.

Demurrer and joinder therein.

1859.

BROOKS

v.

HODGKINSON.

*Montague Smith*, in support of the demurrer.—The rejoinder is bad. The defendants, having caused the plaintiff to be arrested under a writ of *ca. sa.* issued on a judgment for less than 20*l.*, are liable in this action, although the writ has not been set aside. By the 7 & 8 Vict. c. 96, s. 57, “no person shall be taken or charged in execution upon any judgment obtained in any of her Majesty’s superior Courts, or in any County Court, Court of Requests, or other inferior court, in any action for the recovery of any debt, wherein the sum recovered shall not exceed the sum of 20*l.*, exclusive of the costs recovered by such judgment.” The 59th section enables the Judge who tried the cause to order the defendant to be taken in execution, if it appears that he has obtained credit from the plaintiff under false pretences &c. The effect of those enactments is to abolish the writ of *ca. sa.* where the judgment is for a sum not exceeding 20*l.*, and the case is the same as if the plaintiff had been imprisoned without any writ having issued. The rule of law is thus stated by *De Grey*, C. J., in *Barker v. Braham* (a):—“A sheriff or his officers, or any acting under his or their authority, may justify themselves by pleading the writ only, because *that* is sufficient for their excuse, although there be no judgment or record to support or warrant such writ; but if a stranger interposes, and sets the sheriff to do an execution, he must take care to find a record that warrants the writ, and must plead it; so must the party himself at whose suit such an execution is made.” In *Collett v. Foster* (b) it was held that the defendant was liable in trespass for the act of her attorney in causing the plaintiff

(a) 3 Wils. 368. 376.

(b) 2 H. &amp; N. 356.

1859.  
 {  
 BROOKS  
 v.  
 HODGKINSON.

to be arrested under a ca. sa. issued on a judgment upon a warrant of attorney under which 20*l.* was not due, the ca. sa. having been set aside by a Judge. There judgment was signed for 60*l.*, so that there was a judgment which *prima facie* authorized the writ: here judgment was recovered for 13*l.* only.

*Pinder*, *contra*.—The writ is not void, but only irregular, and whilst it continues in force operates as a protection to all persons acting under it: *Blanchenay v. Burt* (a). The defect might have been taken advantage of by writ of error: *Prentice v. Harrison* (b), Com. Dig. "Pleader" (3 B. 1); or the ca. sa. might have been set aside. In the latter event trespass might have been maintained against the defendant. In *Barker v. Braham* (c) there was no judgment to warrant the writ; for the action was against an administratrix, and she was taken in execution without any suggestion that she had been guilty of a *devastavit*. *De Grey*, C. J., said that where a judgment is set aside trespass will lie, "for by the vacating of the judgment it is as if it had never been, and not like a judgment reversed by error." The 81st section of the Irish Insolvent Debtors Act, 3 & 4 Vict. c. 107, enacts, "that no person who shall have become entitled to the benefit of that Act, &c. shall at any time thereafter be imprisoned by reason of the judgment so as aforesaid entered up against him," &c., but that, upon arrest, a Judge may release him from custody; and the 82nd section provides, "that after any person shall have become entitled to the benefit of that Act by any such adjudication, no writ of *capias ad satisfaciendum*, *fieri facias*, or other writ of execution against the body, goods, or chattels of such prisoner, shall issue on any judgment," &c.; yet it has been held that trespass will not

(a) 4 Q. B. 707.

(b) 4 Q. B. 852.

(c) 3 Wils. 368. 376.

lie against a creditor who without malice sues out a ca. sa. upon a judgment regularly obtained by him against his debtor after the debtor's discharge under that Act: *Ewart v. Jones* (a). In *Parsons v. Loyd* (b) the writ was a mere nullity, nevertheless it was set aside before the action of trespass was brought against the party who sued it out. Whether the writ be set aside or not, the sheriff, and all persons acting under him, may justify under it, however irregular, provided it be not void on the face of it, or did not issue from a Court without jurisdiction: Chit. Arch. Prac. p. 589, 9th ed. In *Cameron v. Lightfoot* (c), where *De Grey*, C. J., says "that for all arrests made without lawful authority trespass and false imprisonment will lie," he gives these instances—"as if there be *no* writ, or a *void* writ."—He also referred to *Johnson v. Harris* (d).

1859.  
  
 BROOKS  
 v.  
 HODGKINSON.

*Montague Smith* replied.

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to maintain this action: therefore our judgment upon this demurrer must be for the plaintiff. It is impossible to get over the words of the 57th section of the 7 & 8 Vict. c. 96, which says that "no person shall be taken or charged in execution upon any judgment &c. whereon the sum recovered shall not exceed the sum of 20*l*." Here the sum recovered did not exceed 20*l*., and therefore the defendants had no right to take the plaintiff in execution. It is not necessary to say more than that, the Act being express and unambiguous, we must decide according to its terms.

MARTIN, B.—I am of the same opinion. The cases which have been cited are inapplicable. The question

(a) 14 M. & W. 774.

(b) 3 Wils. 341.

(c) 2 W. Black. 1189.

(d) 15 C. B. 357.

1859.  
 ~~~~~  
 BROOKS  
 v.  
 HODGKINSON.

depends on the enactment of the legislature, and all we have to do is to carry it into effect. The legislature has said that no person shall be taken in execution upon a judgment whereon the sum recovered shall not exceed 20*l*. The plain meaning of that is, that he shall not be imprisoned under a writ of *ca. sa.* issued on such a judgment. Then, if he is imprisoned contrary to law, he is entitled to maintain an action of trespass against the person who has caused him to be imprisoned.

BRAMWELL, B.—I am of the same opinion.

WATSON, B.—It is sufficient to say that, though the sheriff might justify under the writ, the defendants, who have caused the plaintiff to be taken in execution, are liable in this action. In my opinion, the writ is not merely irregular, but absolutely void, because it has issued contrary to law.

Judgment for the plaintiff.

June 2.

HICKMAN v. MACHIN.

In 1856, B., a mortgagor in possession, agreed that he and all necessary parties would execute, and the defendant agreed to take,

a lease of certain premises; the defendant, until the lease should be granted, to have the use and occupation thereof as tenant from year to year. There was a provision for payment of costs of B. and the mortgagees. The mortgagees assented to the agreement though they were not parties to it. The defendant entered and paid rent to B. up to Michaelmas 1857. On the 12th of December, 1857, B. assigned to the plaintiff. In April, 1858, the mortgagees gave notice to the defendant to pay the rent due to them, but no rent was in fact paid to them by the defendant. The plaintiff sued for the rent due from Christmas 1857.—*Held*, that the notice by the mortgagees to the defendant to pay rent to them was no answer to the action for the rent due either before or since the notice.

USE and occupation.—Plea: Never indebted.—The particulars claimed five quarters rent up to Christmas 1858.

At the trial, before Lord *Campbell*, C. J., at the Spring Assizes at Warwick, it appeared that one Beager being in possession of the premises, on the 10th of February

1854 mortgaged his interest therein but remained in possession. On the 8th of March, 1856, he entered into an agreement in writing with the defendant, Machin, whereby it was agreed that Beager and all necessary parties should execute, and Machin agreed to take, a lease of the premises for twenty-five years from the 28th of March then next ensuing: and it was further agreed that till the said lease should be granted Machin should have the use and occupation of the premises as tenant from year to year on the terms thereof. There was a provision for the payment of the costs of Beager and his mortgagees. The mortgagees were not parties to the agreement, though they were cognizant of and assented to it. Machin entered and paid to Beager six quarters rent. On the 18th of June, 1857, the mortgagees' attorney sent to the defendant a draft lease in accordance with the agreement, making Beager and the mortgagees parties, and reserving the rent to the latter. The draft was afterwards returned but no lease was executed. By indenture, dated the 12th of December, 1857, Beager assigned all his estate and interest to the plaintiff by a deed reciting the mortgage. On the 10th of April, 1858, the mortgagees gave notice to the defendant to pay them the rent due. He had paid no rent since Michaelmas 1857.

Upon these facts, the learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

*Brewer* having obtained a rule nisi to enter the verdict accordingly, on the grounds that there was no use and occupation by permission of the plaintiff; that the use and occupation was under a contract with Beager and his mortgagees and not with the plaintiff, and that no contract was proved between the plaintiff and the defendant to enable the plaintiff to sue,

1859.  
HICKMAN  
v.  
MACHIN.

1859.  
 HICKMAN  
 v.  
 MACHIN.

*Hayes*, Serjt., and *Field* now shewed cause.—The notice by the mortgagees cannot affect the right of the mortgagor against his tenant. The mortgage having been prior to the demise to the defendant, the defence amounts to a plea of “nil habuit in tenementis.” It is said that the mortgagees should have been plaintiffs, but the agreement was between Beager and the defendant. The stipulation that all necessary parties should join in granting the lease does not affect the agreement which is with Beager alone. If the present action cannot be maintained the defendant will escape the payment of rent altogether, because he is not liable for mesne profits; he might say, in answer to an action of trespass brought by the mortgagees to recover them, “I occupied by your licence.” As long as a tenant remains in possession he must pay rent to the party of whom he took the premises. The notice by the mortgagees had not the effect of altering the existing tenancy: *Wilton v. Dunn* (a). [*Martin*, B.—That case applies only to rent due before the notice by the mortgagee. It merely decides that after the debt had become due the mortgagee’s notice could not affect a vested right of action. *Watson*, B.—Mere notice cannot alter the contract so as to make the defendant tenant to the mortgagees. In the note by *Willes*, J., to *Moss v. Gallimore* (b), it is said:—“The cases on this subject might be reconciled to ordinary principles, without straining after any peculiar rule applicable to the case of mortgagor and mortgagee, by observing that a tenant of the mortgagor, whose tenancy has commenced since the mortgage, may in case of an eviction by the mortgagee either actual or constructive, (for instance, an attornment to him under threat of eviction (c)), dispute the mortgagor’s title to


(a) 17 Q. B. 294.

(b) 1 Smith’s Leading Cases, p. 479, 4th ed.

(c) Referring to *Doe d. Higginbotham v. Barton*, 11 A. & E.

314; *Doe d. Mayor of Poole v. Whitt*, 15 M. & W. 571. See *Delaney v. Fox*, 2 C. B., N. S., 768.

either the land or the rent (which is no more than any tenant may do upon an eviction by title paramount); and further, that he may, although there has been no eviction, defend an action for rent by proof of a payment under constraint, in discharge of the mortgagor's claim (*a*) (which right is analogous to that of an ordinary tenant in respect of payments on account of rent-charges and other claims issuing out of the land of which examples are cited in the note to *Lampleigh v. Brathwait* (*b*)); so that a tenant who has come in under the mortgagor after the mortgagee, and has neither paid rent to the mortgagee nor been evicted by him, either actually or constructively before the day of payment, cannot defend an action by the mortgagor for that rent."]

1859.  
  
 HICKMAN  
 v.  
 MACHIN.

*Brewer*, in support of the rule.—In this case Beager, the mortgagor, entered into the agreement with the defendant as agent of the mortgagees, and on behalf of the mortgagees as well as of himself. On paying rent the defendant paid it not to Beager alone but to the mortgagees. On the face of the agreement it is shewn that Beager was only mortgagor. *Churchward v. Ford* (*c*) is an authority, that in order to maintain the present action, it is necessary to shew a contract between the plaintiff and the defendant. Here there was no such contract and no occupation by the plaintiff's permission. But there was evidence that the defendant occupied by permission of the mortgagees.—On this point he referred to the judgment of *Parke, B.*, in *Turner v. Cameron's Coalbrook Steam Coal Company* (*d*).

POLLOCK, C. B.—We are all of opinion that the rule


(*a*) Citing *Johnson v. Jones*, p. 131, 4th ed.  
 9 A. & E. 809. (c) 2 H. & N. 446.  
 (b) 1 Smith's Leading Cases, (d) 5 Exch. 932. See p. 937.

1859.  
 HICKMAN  
 v.  
 MACHIN.

must be discharged. The facts lie in a narrow compass. Beager, the mortgagor in possession, entered into an agreement, by which it was provided, that the defendant should have a lease, and in the meantime hold as tenant from year to year. Under this agreement the defendant entered and paid rent to Beager. Beager assigned his interest to the plaintiff, and thereupon the plaintiff became the lessor and the defendant the lessee of the tenement from year to year. The mortgagees appear to have given notice to the defendant to pay rent to them, but no rent was paid. Notice by a mortgagee to a tenant, calling on him to pay rent to the mortgagee, has not the effect of an attornment. It has been decided that a mere notice amounts to nothing: it is no answer to an action on the contract between the landlord and the tenant. Coupled with attornment it is in substance equivalent to eviction, because the tenant is not bound to resist; and in such case the tenant may plead eviction. Here, however, the simple question is, whether a mere notice by the mortgagees changes the situation of the parties so as to prevent the assignment of the mortgagee from recovering rent from his tenant, and upon that point the direction of the learned Judge was right.

MARTIN B.—I am of the same opinion. The question has been treated as if Beager were the plaintiff. I give no opinion upon the point whether, if a mortgagee loses land by foreclosure, his assignee can sue for rent. But assuming that the plaintiff stands in the same position as Beager, what is the true meaning of the notice? Did Beager act in his own behalf or as agent for the mortgagees? I think he acted in his own behalf. The contract is between him and Machin, and is a contract in behalf of Beager himself. The mortgage as it is acted upon is agreed between the parties herself—

not between the mortgagees and Machin. I agree with my brother *Hayes* that, as long as a tenant remains in possession, he must pay rent to the person of whom he took. If the rule were otherwise it might materially affect the title to rents. I collect from the language of *Parke, B.*, in *Gouldsworth v. Knights (a)*, referring to *Doe d. Higginbotham v. Barton (b)*, that he thought that notice was equivalent to eviction. That was merely the expression of an opinion, not a judgment.

1859.  
  
 HICKMAN  
 v.  
 MACHIN.

BRAMWELL, B.—The case has been argued as if Beager were the plaintiff, and there is no doubt that he would have been entitled to recover. I have always understood that in a case like the present, a defendant could only get rid of the tenancy by shewing a notice by the mortgagee and payment of rent to him, which operates either as determining his landlord's interest and so is equivalent to eviction; or, if notice is given and acted upon, it may be considered an answer to the claim for rent, in the same way as the payment of any other charge would be. But the defendant has not paid, and if the answer he now makes were a good one a tenant might always say "some one else has claimed." Suppose Beager had brought an action and declared in debt on the demise, the defendant could not deny the demise or his own entry under it. I think Beager's interest was capable of assignment in accordance with the opinion of *Parke, B.*, in *Gouldsworth v. Knights (a)*. Suppose the declaration alleged that Beager, being seised in fee, assigned to the plaintiff: if the defendant pleaded that he was not seised, that would amount to "nil habuit in tenementis:",

(a) 11 M. & W. 337. See 1 Smith's Leading Cases, p. 66, 4th ed.

(b) 3 P. & D. 194. In this

case it appears that the defendants offered to prove that rent had been actually paid by them to the mortgagee.

1859.  
 HICKMAN  
 v.  
 MACHIN.

*Weld v. Baxter* (a). If that point had been pressed I should have had no difficulty in dealing with it. Another point, viz. that the assignee of the reversion of a parol lease cannot sue for the rent, is disposed of by the case of *Standen v. Christmas* (b).

WATSON, B.—I agree that the rule must be discharged. I give no opinion as to how far a lease by estoppel is good so as to enable the assignee of the lessor to sue. That point is not raised. I decide the case on the ground that the letting, if a letting by deed, would be good by estoppel. The mortgagees have given notice to the tenant. Is that enough to determine the contract between the landlord and the tenant? Many loose expressions are to be found in the books as to the position of a mortgagor. Sometimes he is said to be the agent of the mortgagee; sometimes to be tenant to him. The case is put upon the true ground in the last edition of Smith's Leading Cases (c). The mortgagor is not a tenant at all; he has no interest. Applying that principle to the present case there is a lease good by way of estoppel, and the defence amounts to "nil habuit in tenementis."

Rule discharged (d).

(a) 1 H. & N. 568.

(b) 10 Q. B. 135.

(c) Vol. 1, p. 479, 4th ed.

(d) See *Cuthbertson v. Irving*,  
*post*, p. 742.

1859.

HOWE v. SCARROTT.

SHARP v. SCARROTT.

May 28.

**T**HESE were actions of replevin tried before *Crowder, J.*, at the last Spring Assizes at Winchester.

In *Howe v. Scarrott* the plaint stated that the defendant, in a certain dwelling house, 37, Havant Street, took the goods of the plaintiff and unjustly detained them, &c.

**Avowries.**—First: The defendant well avows the taking of the said goods in the said dwelling house, because the plaintiff, during all the time when the rent hereinafter mentioned to have been distrained for was accruing and becoming due, and when it became due, and from thence until and at the said time when &c., held and enjoyed the dwelling house in which &c., as tenant thereof to the defendant under and by virtue of a certain demise thereof to the plaintiff theretofore made by the defendant and Eliza his wife, since deceased, at and under a certain rent, to wit the yearly sum of 14*l.*, payable quarterly, on the 25th of March, the 24th of June, the 29th of September, and the 25th of December in each year, by equal and even portions in every year during the said tenancy, and because a large sum of money, to wit 7*l.*, of the rent aforesaid, for two quarters of a year ending on the 29th of September, 1858, and from thence until and at the said time when &c., was due and in arrear from the plaintiff to the defendant, the same having accrued due after the death of the said Eliza, the defendant well avows the taking &c., as a distress for the said sum of 7*l.* &c.

**Second.**—That the plaintiff, when the rent distrained for was accruing and became due, and from thence &c., held

By marriage settlement real estates were conveyed to trustees in trust to permit the wife to receive the rents to her sole use independently of her husband. After the marriage the husband let the premises to tenants, speaking of them as property in which his wife was interested. The wife received the rents during her life.—

*Held*, that it was a question of fact in what character the husband let the premises, whether as agent for the trustees or as dealing with his wife's property; and that after the death of the wife the tenants were not estopped from denying that the husband had any interest, unless it was found that he let in his own name.

1859.  
 ⏟  
 HOWE  
 v.  
 SCARROTT.  
 SHARP  
 v.  
 SCARROTT.

and enjoyed the dwelling house as tenant thereof to the defendant by virtue of a demise to the plaintiff made by the defendant at a certain rent, payable &c., and because 7*l.* was due and in arrear the defendant avows the taking of the goods, as a distress &c.

Pleas in bar to the first avowry.—First: That the defendant did not hold the said dwelling house, in which &c., as tenant thereof to the defendant under the said supposed demise. Secondly: That no part of the said supposed rent was in arrear.—Similar pleas were pleaded to the second avowry.

Whereupon issues were joined.

In *Sharp v. Scarrott* the taking of the goods which was complained of was in a dwelling house, 14, King Street, Kingston, in the parish of Portsea.

The pleadings were similar to those in *Howe v. Scarrott*.

At the trial of *Sharp v. Scarrott* the defendant proved that, on the 25th of March, 1858, the plaintiff and his wife called on the defendant and agreed to take the house in King Street, Portsea. The rent asked was 10*l.* a year. The defendant admitted that, the plaintiff wishing to take the house at 9*l.*, he said he and his wife would consider of it.

The plaintiff proved that, prior to 1844, the house was the property of Eliza Bolt, and that, by a settlement made on the marriage of the defendant with the said Eliza Bolt, dated the 8th of July, 1844, it was, with other property, conveyed to William Scott and John Parnell, their heirs and assigns, in trust, after the solemnization of the marriage, that W. Scott and J. Parnell, or the survivor, would assure the messuage thereby granted unto and to the use of such persons as E. Bolt, notwithstanding her coverture, at any time during the life of the defendant and E. Bolt his intended wife, should appoint; and until such appointment

upon trust that W. Scott and J. Parnell should receive the rents when the same should become payable, and pay them during the joint lives of the defendant and E. Bolt to such persons as E. Bolt should, notwithstanding her coverture, appoint; and in default of such appointment should pay such rents into the proper hands of E. Bolt, or otherwise permit her to enjoy the same, for her own sole and separate use and benefit, exclusive of the defendant. The plaintiff swore that, when he took the house, the defendant told him that his wife had bought it before her marriage, and that he had no objection to let the house for 9*l.* if the plaintiff could agree with Mrs. Scarrott. There were no children of the marriage, and the plaintiff's wife, who was illegitimate, died in May, 1858, intestate.

Upon this evidence the learned Judge said that he was of opinion that the defendant had let the house merely as agent, and that there was no estoppel. Whereupon a verdict was entered for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him.

In *Howe v. Scarrott* the defendant proved that, after the execution of the marriage settlement above mentioned, the defendant and his wife let the house, 37, Havant Street, (which had been his wife's property before her marriage, and which, subject to a mortgage thereon, was comprised in the settlement), to the plaintiff at 14*l.* a year. No one but the plaintiff, the defendant and his wife were present, and the trustees of the settlement were not mentioned. The defendant said that he assented to his wife's receiving the rent, which she generally did, and that after his wife's death he demanded the rent due, but the plaintiff refused to pay it to him. On cross-examination, he stated that it was he who let the house.

The plaintiff's witnesses stated that it was Mrs. Scarrott

1859.  
  
 HOWE  
 v.  
 SCARROTT.  
 SHARP  
 v.  
 SCARROTT.

1859.

HOWE

v.

SCARROTT.

SHARP

v.

SCARROTT.

who let the house and received the rent, and the defendant did not interfere. The learned Judge offering to leave any question to the jury, directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter the verdict for him.

*Karslake*, in Easter Term, obtained a rule nisi for a new trial, on the ground that the defendant, on the ground of the avowries, or one of them, were proved, and that there was no evidence of any letting by Mrs. Scarrott, or by the defendant, as agent or agents for the trustees; the plaintiff was estopped from denying that there was a letting to her by the defendant: or for a new trial, on the ground of misdirection, the Judge having held that, in letting the premises, the parties letting acted as agents for the trustees, as there was no estoppel; against which

*Hayes Serjt.* and *J. D. Coleridge* now shewed cause. The question is, whether the defendant can claim the rent which accrued after his wife's death. He admitted that he told the plaintiff that his wife was to receive the rent, but the defendant had no title to the rent. The trustees were bound to pay the rents into the hands of the wife, or to permit her to receive them to her separate use during her life. In letting the premises to the plaintiff, the trustees were acting in pursuance of that permission. The permission by the husband and wife was in conformity with the settlement. The question was simply one of fact. A party who takes from a cestui que trust is at liberty to shew that the cestui que trust let as agent or trustee. In *Valence v. Savage* (a), in case for injury to his reversion, the plaintiff declared that the premises were in the occupation of S. P. as tenant to him; it was held that the allegation was sufficiently proved by shewing

(a) 7 Bing. 596.

S. P. had been let into possession by, and paid rent to, a cestui que trust, to whom the plaintiff was trustee. Suppose the trustee of a marriage settlement allows his cestui que trust to let premises comprised in the settlement, he cannot treat the tenant as a trespasser. Even where, upon a letting by deed, the husband and wife demise, and the reservation of rent is to the husband and wife and the heirs of the wife, the tenant, after the death of the wife, may shew that the husband has no interest: *Hill v. Saunders*(a). It was a question of fact under what title the plaintiff came in.

1859.  
  
 HOWE  
 v.  
 SCARROTT.  
 SHARP  
 v.  
 SCARROTT.

*Montague Smith* and *Karslake*, in support of the rule.—The learned Judge said that he thought that the letting was a letting by the wife as the agent of the trustees. But the trustees never interfered. It must be assumed, as between the defendant and the plaintiff, that the defendant was seised in fee. That being so, the trustees could not, by giving notice, alter the position of the parties to the contract: *Delaney v. Fox* (b). In *Churchward v. Ford* (c) a cestui que trust let in her own name; it was contended that, notice having been given by the trustees to the tenant, they had a right to claim rent from him: but it was held that they could not do so successfully. Here the trustees never claimed, nor were their names ever mentioned: therefore it must be assumed that when the defendant and his wife let the premises they did so in virtue of some right, and the plaintiff was estopped from denying that they demised jointly.

In *Sharp v. Scarrott*, *Karslake* had obtained a similar rule, which he was now called upon to support.

(a) 4 B. & C. 529.

(b) 2 C. B., N. S., 768.

(c) 2 H. & N. 446.

1859.

HOWE  
v.  
SCARROTT.  
SHARP  
v.  
SCARROTT.

*Karslake*, in support of the rule.—In the case of *Shaw v. Scarrott* the plaintiff dealt with the defendant; and though he talked of the estate as one in which his wife had an interest, there was no evidence that he let as agent merely, and in fact the trustees had no legal estate.

*J. D. Coleridge*, *contra*, was not called upon to argue.

POLLOCK, C. B.—In these cases separate plaintiffs complained that the defendant distrained their goods. The defendant avowed as landlord; the facts being that the property was the separate property of the wife, and that the wife was dead before the rent accrued. At the trial the question was not distinctly submitted to the jury who was the real contract; but we are to say, on a view of all the facts, whether there was evidence to warrant the finding. I think that the view taken by the learned Judge was correct. Suppose the plaintiff, when he took the property, made inquiries as to who was letting it. The answer would have been "We are letting," that is, the husband and wife. The plaintiff would have said, "You cannot do that, because the property is vested in the trustees of the settlement." The reply would have been, "We have the authority of the trustees." If it is necessary to resort to the trustees, there is no doubt that, as a matter of fact, they gave authority. If let without the authority of the trustees I think it was let as the wife's property on behalf of both.

MARTIN, B.—In *Howe v. Scarrott*, the wife being the beneficial owner of the equity of redemption, the husband and wife demised to the plaintiff. The effect of the demise depended on a question of fact. If it was a demise by the husband

an estoppel arises, and he and the tenant are equally estopped from setting up the real state of the title. But I think it was let by the husband and wife, and in that case the estoppel is excluded. On the death of the wife, there being no tenancy by the courtesy, the interest of the husband ceased; therefore, whoever else may have a title to the rent, the defendant has not.

1859.  
  
 HOWE  
 v.  
 SCARROTT.  
 SHARP  
 v.  
 SCARROTT.

WATSON, B.—I agree that the question is, was the letting a letting by the husband and wife, or by the husband alone? On the evidence, the husband admitted to the persons who took the houses that he held them as the property of his wife. It was not necessary that he should use precise language as a conveyancer would, if he clearly intimated that the property was his wife's. There is the strongest evidence that the trustees assented to the letting. A letting by a cestui que trust, when the trustee allows the cestui que trust to deal with the property, is like a letting by a mortgagor in possession. In *Churchward v. Ford* (a) the effect of a letting by a cestui que trust is put on the true ground. In that case the cestui que trust had let, and the question was whether the tenant occupied by the permission of the trustees, but the trustees had no title to the property. In *Vallance v. Savage* (b) the question of estoppel did not arise. Here there is no evidence to raise an estoppel.

CHANNELL, B.—I also am of opinion that the rule must be discharged. The property in question was settled to the separate use of the defendant's wife, who had therefore an equitable estate: she and her husband let. The question is, whether, under these circumstances, the avowry is

(a) 2 H. & N. 446.

(b) 7 Bing. 595.

1859.  
 HOWE  
 v.  
 SCARROTT.  
 SHARP  
 v.  
 SCARROTT.

supported. I think it is a question of fact. If the letting had been a letting by the husband alone, I should agree with the defendant's counsel that an estoppel would have been created.

Rule discharged.

May 31. JANE BIRKETT, Executrix of JOHN BIRKETT, deceased, v.  
 THE WHITEHAVEN JUNCTION RAILWAY COMPANY.

B. took a ticket from Workington to Carlisle from the Whitehaven Junction Railway Company. In order to arrive at the platform at the station at Maryport the trains pass over the line of the Maryport and Carlisle Railway. On that line is a self-acting switch used for shunting carriages into a siding. The switch and siding were the property of the Maryport and Carlisle Railway Com-


pany, but used exclusively by the Whitehaven Junction Railway Company. The switch is about four yards from a gate which is on the line of the Whitehaven Junction Railway Company, a servant of which Company was in the habit of occasionally looking over the gate to see that the switch was in proper order. It was proved that all switches are liable to get out of order. A train of the Whitehaven Junction Railway coming slowly up to the station, in consequence of the points being turned the wrong way, ran into the siding and came in collision with some coal trucks, whereby B. was killed. The Judge left it to the jury to say whether there was negligence on the part of the Whitehaven Junction Railway Company. The jury found that there was.—*Held*, that the question was properly left to the jury; that there was evidence of such negligence, and that, upon such finding, the Whitehaven Junction Railway Company were liable, under the 9 & 10 Vict. c. 93, to an action by the personal representative of B.

**DECLARATION.**—That the defendants, before and at the time of the happening of the injury hereafter mentioned, were common carriers of passengers by railway for reward to the defendants in that behalf, to wit, by a certain train of carriages of the defendants, to wit, from Workington to Carlisle; yet the defendants so carelessly and negligently behaved themselves in and about the said train and the management thereof, and in and about the sending and forwarding of the said John Birkett on his said journey from Workington to Carlisle, that owing to the negligence and carelessness of the defendants, and their bad management and want of care in respect of the premises, the said train, whilst on the said journey, ran against and came into collision with certain trucks and carriages, and the said John Birkett being in the said train on the said journey, by

reason thereof, then received such hurts and injuries as shortly after caused his death, which happened within twelve calendar months before the commencement of this suit, &c.

Pleas (inter alia).—Not guilty.

At the trial, before *Byles*, J., at the Spring Assizes at Carlisle, it was proved that the deceased John Birkett, who was a draper and kept a post office, on the 16th of June, 1857, took a ticket for Carlisle at the Workington Station on the defendants' railway. On getting to Maryport the train ran off the line into a siding, when it came into collision with some coal waggons in consequence of a switch being turned. The train was going about three miles an hour. The switch was on the line of the Maryport and Carlisle Railway Company, who kept it in repair; but both the switch and the siding were for the exclusive use of the defendants. The points were self-acting. Had they been right, the train would have gone straight forward into the station. John Armstrong, the traffic manager of the Maryport and Carlisle Railway, stated, that it was "the duty of one Hodden, a servant of the Whitehaven Junction Railway Company, to open the gate leading to the Maryport and Carlisle Station, and to attend to the switch which was within the Maryport Station, about four yards from the gates which are on the line of the Whitehaven Company. The switch was under the control of the Maryport and Carlisle Railway Company. The Whitehaven Railway Company paid rent to the Maryport and Carlisle Railway Company for the use of the station and switch. It was the practice for Hodden, the defendants' gateman, to look at the switch and see that it was right. The switch was a self-acting one; but no points are safe without a man to attend to them." John Birkett died of softening of the brain, which the plaintiff's witnesses stated to have been caused by the

1859.  
  
 BIRKETT  
 v.  
 WHITEHAVEN  
 JUNCTION  
 RAILWAY Co.

1859.  
BIRKETT  
v.  
WHITEHAVEN  
JUNCTION  
RAILWAY CO.

collision. It was proved that he had been in the receipt of 50*l.* a year from the post office, and did business amounting to 3,500*l.* a year, the estimated profit in which was 210*l.* After his death it turned out that he was insolvent, his estate paying 16*s.* 6*d.* in the pound.

The defendants' witnesses proved that the deceased had been in bad health before the accident, suffering from dyspepsia and difficulty of breathing: that in January, 1857, his memory had become defective and his temper irritable. Medical witnesses proved that the symptoms were those of softening of the brain; but they admitted that a blow on the head might have produced disease and softening of the brain.

On this evidence the learned Judge left it to the jury to say, first, whether the collision, alleged to have been the proximate cause of death, was caused by the negligence of the defendants. He said that though the switch was on the line of the Maryport and Carlisle Railway, even that Company had the care of it, which was not the case, the defendants would have been answerable to the plaintiff for its negligent management. If the care of the switch was entrusted to Hodden, the man stationed at the gates, and he was the servant of the defendants, was it negligence on the part of the defendants that Hodden did not take care to see that the switch was right? Secondly, was the death of the deceased caused by the accident? If he had a fatal disease which would be sure to kill him, but his death was precipitated by the collision, the defendants were liable. As to the damages: that the plaintiff was only entitled to recover for actual pecuniary loss. If sound, the deceased might have lived for several years; if unsound he would have died in a short time, or a year or two, and the amount of damages would be less.

The jury found a verdict for the plaintiff, with 200*l.*

damages. In answer to further questions by the learned Judge; first, whether there was negligence in the defendants' servant not having attended to the switch, they stated that they were not satisfied that there was any one at the switch; secondly, whether there was negligence on the part of the Whitehaven Junction Railway Company, they found that there was.

*Edward James*, in Easter Term, obtained a rule nisi to enter a nonsuit or for a new trial, on the ground that there was no evidence of such negligence: that the defendants had no duty imposed upon them to look after the switch, and that the damages were excessive.

*S. Temple* and *Crompton Hutton* now shewed cause.—First: it is said that there was no negligence on the part of the defendants, the points having been under the control of the Maryport and Carlisle Railway Company; but even in that case the defendants are liable. [*Bramwell*, B.—Would you so contend if the switch had been entirely under the control of the Maryport and Carlisle Company? Suppose that Company had taken up a rail a mile from the junction, would the Whitehaven Company have been liable unless it was shewn that they chose to go on knowing that the rail had been taken up? *Pollock*, C. B.—No doubt, if a person employs a contractor to build a bridge, or construct a wall, the responsibility for damage from negligence does not attach to the party employing the contractor, but to the contractor. But when a contractor agrees to do certain work, for instance, if he contracts to build a house, and then employs another, who is liable for the default of the sub-contractor?] Here the defendants contracted to carry the deceased to Carlisle, and in order to fulfil their contract they must have a control over the line to Carlisle.

1859.  
BIRKETT  
v.  
WHITEHAVEN  
JUNCTION  
RAILWAY CO.


1859.  
 BIRKETT  
 v.  
 WHITEHAVEN  
 JUNCTION  
 RAILWAY CO.

Where a contract is made by a railway Company to carry a passenger from London to some distant place, if the passenger is carried by the contracting Company over lines belonging to other Companies, and an accident happens by the default of such Companies, the contracting Company is liable: they contract that there shall be no negligence on the part of such other Companies: see per *Rolfe, B.*, in *Muschamp v. The Lancaster and Preston Railway Company (a)*. [*Brammell, B.*—If the Maryport Railway Company took up a rail, knowing that the carriages of the Whitehaven Company were coming, an action would lie against them by every passenger injured.] The Whitehaven Company undertook to do that which the Maryport Company were perhaps bound to do: *Wilby v. The West Cornwall Railway Company (b)*. [*Brammell, B.*—A carrier who undertakes to carry goods and passengers, in the case of injury to passengers, is only liable for negligence; but he is liable for not carrying goods safely, even without negligence.] Secondly, there was evidence for the jury and they in effect found that the switch was under the direction of the defendants. It was the duty of the defendants to employ a man to look after it. They were entitled to do so because they paid rent for the station including the switch. It was proved that the Maryport and Carlisle Railway Company never had any one to look after the switch: the evidence was, that the man at the gates leading to the Maryport Station looked to it. [*Brammell, B.*—If one railway Company runs its trains over the line of another, and has notice that there is danger at a particular point, the Company should employ a man to look out. It must be assumed that some one was guilty of negligence; *prima facie* it was the man at the switch.] The danger arose

(a) 5 M. & W. 421. 430.

(b) 2 H. & N. 703.


from the switch, which was only used by the defendants, being out of order. Whether the defendants' undertaking bound them to have a man there or not, or the points were self-acting and not in order, it was the defendants' own act which sent the train into the siding. They had a servant at the gates within sight of the switch, who might and ought to have looked after it.

1859.  
  
 BIRKETT  
 v.  
 WHITEHAVEN  
 JUNCTION  
 RAILWAY Co.

*Edward James and Overend*, in support of the rule.—The learned Judge ruled that it was the duty of the defendants to take care of the switch. If he was wrong in that, he was wrong in leaving the question of negligence to the jury. The action under the 9 & 10 Vict. c. 93, is not founded on the contract to carry, but upon the negligence, and should have been brought against the Maryport and Carlisle Railway Company as owners of the line and switch, the defect in which caused the accident. That Company would have been responsible upon the principle on which *Parnaby v. The Lancaster Canal Company* (a) and *Manley v. The St. Helen's Canal and Railway Company* (b) were decided. The Maryport and Carlisle Railway Company's Act empowers any person to travel on the line on payment of tolls; the railway is therefore a public highway. The 89th section of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), which is incorporated in the Whitehaven Junction Railway Company's Act, provides that the Company, *as carriers*, shall not be liable to any greater extent than stage coach proprietors or common carriers would be liable. The Maryport and Carlisle Railway Company would have been responsible to any person lawfully travelling on the line. The contract of a passenger with the defendants would not affect his

(a) 11 A. & E. 223. 230.

(b) 2 H. & N. 840.

1859.  
  
 BIRKETT  
 v.  
 WHITEHAVEN  
 JUNCTION  
 RAILWAY CO.

right to sue the Maryport and Carlisle Company: *Dalyell v. Tyrer (a)*. The defendants contracted in two capacities—as carriers and as proprietors of the entire line of railway. As to their own line, they may have contracted that it should be in proper order; that is a matter under their own control. But they do not so contract as to the line of another Company over which they have merely power to run. Here the defendants had nothing to do with the switch, which was on the line and under the control of the Maryport and Carlisle Railway Company. No doubt, if the man stationed at the gate for the purpose of looking after it had seen anything wrong, he would have put the switch right; but whatever he did would not have been as the servant of the defendants, but as a mere volunteer. [*Bramwell*, B.—After the verdict, it must be taken that self-acting points are liable to get out of order, and that the defendants knew it. Were they not then bound to see that they were right before coming over them?]

POLLOCK, C. B.—The rule must be discharged. Many points were discussed on the argument upon which I do not think it necessary to give an opinion. It was argued, on behalf of the plaintiff, that a railway Company carrying passengers over the line of another Company is responsible for any accident that may happen in consequence of the negligence of such other Company. On that point I give no opinion. The rule must be discharged, on the ground that the question of negligence was left to the jury and found by them against the defendants. The conclusion arrived at by the jury appears to have been well founded, and not open to any objection. As to the question of damages there is no ground for interfering with the verdict. There is no

(a) 28 L. J. Q. B. 52.

evidence that the plaintiff was unfit to travel. A man may be in such a state of disease that he ought not to venture into the streets at all; and a person who travels on a railway should be fit for the journey. But there is nothing to lead to the inference that the deceased was in such a state as to be unfit for the journey.

1859.  
BIRKETT  
v.  
WHITEHAVEN  
JUNCTION  
RAILWAY Co.

MARTIN, B.—I agree that the rule must be discharged. I give no opinion on the question whether the Maryport and Carlisle Railway Company are liable to the plaintiff. The plaintiff took a ticket for Carlisle from the Whitehaven Junction Railway Company. It was the duty of that Company to take care to carry the deceased safely. In consequence of a defect in the switch there was a collision. If there was negligence in not attending properly to the switch the defendants are liable, because one of the obligations which the defendants undertook was care in passing over that which was known to be dangerous. The possible liability of the Maryport and Carlisle Railway Company has no bearing on the question. The learned Judge thought that it was the duty of the man stationed at the gates to take care of the switch: he did not decide it as matter of law, but left it to the jury as a question of fact. The jury seem not to have agreed with him, but to have thought that there was negligence on the part of the defendants in not having a man to look after the points.

BRAMWELL, B.—I agree that the rule must be discharged for the reasons given by my lord. It is conceded that there was negligence on the part of somebody; and that such negligence was with reference to the points which ought to have been looked after by someone. There was danger in coming over them without extraordinary precautions, and the defendants, not having taken such precautions, were

1859.  
 BIRKETT  
 v.  
 WHITEHAVEN  
 JUNCTION  
 RAILWAY CO.

guilty of negligence. Therefore I think that the question was rightly decided, on the ground that the defendants brought their train where the points were not looked after, knowing there was danger in doing so. As to the point, whether a railway Company undertakes for the safety of other lines over which their trains travel, I give no opinion.

WATSON, B., concurred.

Rule discharged.

June 16.

M'KEWAN, Public Officer, &c., v. ROLT.

Under the 51st section of the Common Law Procedure Act, 1854, interrogatories may be administered to the public officer suing on behalf of a banking Company, carrying on business in copartnership, under the 7 Geo. 4, c. 46.

*GARTH* had obtained a rule calling on the plaintiff to shew cause why interrogatories should not be exhibited to him, pursuant to the 51st section of the Common Law Procedure Act, 1854.

The plaintiff sued as the Public Officer of the London and County Banking Company, united in copartnership, for the purpose of carrying on the business of bankers, pursuant to 7 Geo. 4, c. 46.

*W. G. Harrison* now shewed cause.—The public officer of a banking Company, carrying on business under 7 Geo. 4, c. 46, is merely the nominal plaintiff—not “the opposite party” within the meaning of those words in the 51st section. That section makes provision for administering interrogatories to the officer of a corporation when a corporation is party to a suit; but such a banking Company is not a corporation. The shareholders are the real parties to the suit, and the public officer is a mere nominal plaintiff whom the legislature enabled to sue, to avoid the inconvenience which would result if all the shareholders

were named in the proceedings (*a*). [*Martin*, B.—The plaintiff is a party to the suit; one proof of which is, that execution may issue against him without a scire facias, if he is a shareholder (*b*). My impression is, that interrogatories might be delivered both to the plaintiff on the record and to the other members of the copartnership.]

1859.  
 M'KEWAN  
 v.  
 ROLT.

*Garth*, who appeared in support of the rule, was not called on.

POLLOCK, C. B.—We are all of opinion that the rule must be absolute.

Rule absolute.

(*a*) He referred to *Chapman v.* 9 C. B. 661.  
*Milvain*, 5 Exch. 61, and *The* (*b*) *Harwood v. Law*, 7 M. &  
*Bank of Australasia v. Harding*, W. 203.

### BATSON v. KING.

June 16.

**ACTION** for money paid.—Plea: Never indebted.

At the trial, before *Pollock*, C. B., at the Middlesex sittings in Easter Term, it was proved that one Dalton wanting to raise money to commence business as a betting house keeper, one Brittain agreed to advance the money on the security of a bill drawn by the plaintiff, accepted by Dalton and indorsed by the defendant; to which the plaintiff agreed to become party on the defendant's promise that he should not be called on to pay. When the bill became due the plaintiff was compelled to pay it. The defendant's counsel

One Dalton wanting money, he and the defendant applied to the plaintiff to draw a bill, to be accepted by Dalton and indorsed by the defendant, and the defendant promised the plaintiff that he should not be called upon. The jury found that Dalton

and the defendant were both principals in the transaction:—*Held*, that the plaintiff, having paid the bill, was entitled to recover the amount without proof of a promise in writing under the 4th section of the Statute of Frauds.

1859.

BATSON  
v.  
KING.

objected that this promise was within the 4th section of the Statute of Frauds, 29 Car. 2, c. 3, and cited *Green v. Cresswell* (a). The learned Judge left it to the jury to say whether the defendant was liable jointly with Dalton as principal, and, the jury having answered the question in the affirmative, he reserved leave to the defendant to move to reduce the verdict by one half.

*Huddleston*, in this Term (May 28), moved accordingly. —As to one half the amount paid by the plaintiff, he cannot recover it as contribution, but only on the special promise of the defendant to indemnify him against the default of Dalton. [*Channell*, B.—You would say that if the obligation arises, not from the position of the party as a surety called on to pay, but from an express promise, it is within the statute.] In *Green v. Cresswell* (a) it was held that, if a person becomes bail for a stranger in consideration of another's request and of the latter promising to indemnify the former against the consequences, no action lies upon such promise, unless it be in writing under the statute. [*Pollock*, C. B.—If a man says to another, "If you will at my request put your name to a bill of exchange I will save you harmless," that is not within the statute. It is not a responsibility for the debt of another. It amounts to a contract by one, that if the other will put himself in a certain situation the first will indemnify him against the consequences. In *Green v. Cresswell* (a), Lord Denman pointed out a distinction between that case and one where the defendant is a co-surety. I do not think that the case itself was rightly decided. *Martin*, B.—If the argument for the defendant were well founded, it would apply to all cases of joint suretyship. In *Reynolds v. Doyle* (b) it was held, that the implied promise by a person who requests

(a) 10 A. &amp; E. 453.

(b) 1 Man. &amp; G. 753.

another to lend his acceptance, to indemnify him against the consequences of nonpayment, was binding; and that the Statute of Limitations ran from the time of the payment of the money.]

1859.  
BATSON  
v.  
KING.

A rule nisi having been granted, *Joyce* now appeared to shew cause, but the Court called on

*Finlason*, to support the rule.—The defendant's liability was collateral to that of Dalton, the acceptor, who would be bound in the first instance to indemnify the plaintiff, the accommodation drawer. Therefore the promise of the defendant was to answer for the default of another, viz. Dalton, the acceptor.

MARTIN, B.—The rule must be discharged. As between the holder of the bill of exchange and the parties whose names were on it, Dalton as acceptor was primarily liable, and the drawer and indorser stood in the relation of sureties for him. But as between the parties it may always be proved what is the real nature of the transaction. As between themselves Dalton and the defendant were the real principals. The plaintiff, having paid the bill, had a right to sue the defendant for money paid to his use. The Statute of Frauds has no application to the case; and the question in *Green v. Cresswell* did not arise here. It might have been otherwise if Dalton had been entirely separate from the defendant and the plaintiff had become responsible for Dalton, upon the defendant's promise to indemnify him. Dalton and the defendant being both principals, the only answer which the defendant had was by a plea in abatement for the non-joinder of Dalton.

POLLOCK, C. B., and WATSON, B., concurred.

Rule discharged.

## TRINITY VACATION, 23 VICT.

1859.

June 24.

CUTHBERTSON v. IRVING.

If any estate or interest passes from a lessor, or his real title is shewn upon the face of the lease, there can be no estoppel.

If a lessor has no title, and the lessee

be evicted by title paramount, he may plead that as a defence to an action by the lessor.

But so long as a lessee continues in possession under the lease, he cannot set up any defence founded upon the fact that the lessor "nil habuit in tenementis;" and upon the execution of the lease there is, in contemplation of the law, created in the lessor a reversion in fee simple by which an estoppel which passes by descent to his heir and by purchase to his assignee or devisee, who may sue on the covenants in the lease.

J. B., being mortgagor in possession, on the 22nd of February, 1848, by indenture, executed by him and the defendant, demised to the defendant certain premises for seven years at a year's rent. The lease contained a covenant by the defendant with J. B., his heirs and assigns, to repair the premises, J. B. finding iron and wood for that purpose. On the 2nd of February, 1851, J. B. executed an indenture, whereby, after reciting that the premises were mortgaged and that he had sold the equity of redemption to the plaintiff, he "granted, bargained and sold, aliened, released and surrendered the premises, and all his estate, right and title, both at law and in equity therein, to the plaintiff: to have and to hold to him, his heirs and assigns, for ever." The defendant paid rent to J. B. until the execution of this indenture, and after that time to the plaintiff. The plaintiff sued the defendant for a breach of the covenant to repair; and the declaration, after stating the lease and covenant, alleged that J. B. by deed assigned the premises to the plaintiff; whereby the reversion thereof, subject to the term created by the lease, was vested in him. The defendant pleaded, secondly, that J. B. did not assign the premises to the plaintiff; nor had he at the time of making of the lease any reversion of and in the premises; and that if any reversion in the premises came to the plaintiff. Fourthly, that J. B. did not nor would the plaintiff, find iron and wood, as in the covenant mentioned.

*Held*, that the plaintiff was entitled to have the verdict on the second plea entered for him, for that the defendant was estopped from disputing that J. B. was seised of an estate in reversion; and as there were apt words in the assignment to convey a legal estate in fee in reversion to the plaintiff, the estoppel continued in his favour, notwithstanding the assignment to him shewed the want of title, and consequently he might sue on the covenants in the lease as assignee of the reversion.

*Held* also, on demurrer to the fourth plea, that it was bad; and that, although the declaration was informal for not alleging that J. B. was seised of some estate which by assignment would pass to the plaintiff as assignee, yet sufficient appeared in the declaration to shew that the plaintiff claimed to be assignee of an estate in reversion, and therefore, formerly, the objection would only have been open (if at all) on special demurrer; and now the remedy was by application under the 52nd section of the Common Law Procedure Act 1852.

the going gear and machinery thereto belonging and then used therewith, for a term of seven years, which has since expired, at a certain annual rent of 90*l*. And the defendant did thereby, for himself, his heirs, executors and administrators, covenant with the said John Biglands, his heirs and assigns, that he the defendant would from time to time during the continuance of that demise, at his or their own costs and charges, repair, support, maintain and keep the said water corn mill, brickwork, &c., machinery and going gear to the said mill belonging, in good, substantial and tenantable repair, order and condition; the said John Biglands, his heirs and assigns, finding iron and wood for that purpose, and the defendant finding workmanship (damage by fire and flood only excepted); and in such repair, order and condition should and would leave and deliver up the same to the said John Biglands, his heirs and assigns, at the expiration or other sooner determination of that demise. And the said John Biglands afterwards, and during the said term, by a certain deed by him duly made in that behalf, assigned the premises in the said indenture comprised to the plaintiff, whereby the reversion thereof, subject to the said term, came to and vested in the plaintiff. And although the plaintiff has always since that time performed all things and conditions precedent on his part to be performed, and all things and conditions precedent to the defendant's liability hereinafter mentioned always took place and were done, and no damage happened by fire or flood, yet the defendant did not nor would, during the said term, repair, support, maintain or keep the said mill works in good, substantial and tenantable repair, order and condition, or in such repair, order and condition leave and deliver up the same to the plaintiff at the expiration of the said demise, according to his said covenant. And the plaintiff says that the said mill works were, after the said reversion

1859.  
CUTHBERTSON  
v.  
IRVING.

1859.

CUTHBERTSON

v.  
IRVING.

came to him as aforesaid, and until and at the end of the said term, and until the same were delivered up as hereinafter mentioned, suffered to be, and were left by the defendant, in a bad and ruinous condition, and greatly prostrate, dilapidated and spoiled for want of the due keeping and performing by the defendant of his said covenant.—There were also breaches alleging that, after the reversion came to the plaintiff, parts of the machinery and gear were pulled down by the defendant; and that the defendant did not deliver up possession of the mill until two months after the expiration of the term.

Second plea.—That the said John Biglands did not assign the premises in the said indenture comprised to the plaintiff; nor had the said John Biglands, at the time of the making of the said lease, any reversion of and in the said premises; nor did any reversion in the premises come to or vest in the plaintiff.

Fourth plea.—As to so much of the declaration as relates to the covenant to repair, support, maintain and keep in good, substantial and tenantable repair, order and condition: the said John Biglands, his heirs and assigns, finding iron and wood for that purpose; and in such repair, order and condition to leave and deliver up the same, and the breaches in respect thereof: the defendant says that the said John Biglands did not nor would, nor did nor would any of his heirs or assigns, nor did nor would the plaintiff, find iron and wood as in the said covenant mentioned and provided, but made default therein.

The plaintiff joined issue on the second plea, and demurred to the fourth.

The issues in fact came on for trial before Byrnes J., at the Common Pleas Spring Assizes, 1854, and were, together with the issue in law raised by the demurrer, referred to an arbitrator, with power to state a special case for the

opinion of this Court. At the request of both parties, the following case was stated :—

On the 22nd February, 1848, the lease in the declaration mentioned, being a lease of a mill and premises for seven years from the 1st August, 1848 (which is to be taken as part of this case (a)), was duly executed by John Biglands,


(a) The material parts of this lease are as follows :—

“ This indenture, made the 22nd day of February, A.D. 1848 : Between John Biglands, of &c., of the first part ; John Irving, of &c., of the second part, and William Irving, of &c., of the third part : Witnesseth, that in consideration of the yearly rent hereby reserved and of the covenants and agreements hereinafter contained, and by or on the part of the said John Irving and William Irving, their executors, administrators, or assigns, to be paid, observed and performed, he, the said John Biglands, Doth hereby demise, lease, and to farm let unto the said John Irving, his executors, administrators, and assigns, All those pieces or parcels of arable and meadow land, &c., situate and being in the township of Birkby, in the county of Cumberland, commonly called or known by the names of East Brow, West Brow, &c. ; And also all that water corn mill, called Birkby Mill, situate in the township of Birkby aforesaid, with all and singular the going gear and machinery thereto belonging and now used therewith, all which said premises are now in the occupation of the said John Irving : To have and to hold the said hereby demised premises

unto the said John Irving, his executors, &c., from Lammas Day next, for and during the term of seven years from thence next ensuing and fully to be completed and ended. Yielding and paying therefore yearly and every year during the said term hereby demised unto the said John Biglands, his heirs and assigns, the rent or sum of 90*l.* sterling, free and clear of and from all taxes, &c., and to be paid by even half-yearly payments on Candlemas Day and Lammas Day in every year. And the said John Irving and William Irving (the said William Irving as surety) for themselves severally, and for their several and respective heirs, executors, &c., do and each of them doth hereby covenant with the said John Biglands, his heirs and assigns, in manner following, &c. (then followed covenants for payment of the rent and taxes). And also, that he the said John Irving, his executors, &c., will, from time to time during the continuance of this demise, at his and their own costs and charges, repair, support, maintain, and the said water corn mill, brickwork, brass, iron, wood works, and other works, bins, tackle, materials, utensils, implements, stones, machinery, and going gear to the said mill belonging, in good, substantial, and

1859.

CUTHBERTSON  
v.  
IRVING.

1859.  
  
 CUTHBERTSON  
 v.  
 IRVING.

the lessor, who was then mortgagor in possession of the demised premises, and by the defendant John Irving, the lessee. At the time of making the above lease, the defendant was in possession of the said mill and premises under a previous lease between the same parties, for five years from the 1st August, 1843; and he continued in possession during the whole of the term granted by the lease of 1848.

On the 2nd February, 1854, the deed referred to in the declaration as an assignment of the reversion to the plaintiff (which is also to be taken as part of this case (a)) was made.

tenantable repair, order, and condition, the said John Biglands, his heirs and assigns, finding iron and wood for that purpose, and the said John Irving finding workmanship (damage by fire or flood only excepted), and in such repair, order, and condition, shall and will leave and deliver up the same to the said John Biglands, his heirs and assigns, at the expiration or sooner determination of this demise," &c.

(a) The material parts of this deed are as follows:—

"This indenture, made the 2nd day of February, A.D. 1854: Between John Biglands, of &c., of the first part; Benjamin Biglands, of &c., of the second part; Joseph Cuthbertson, of &c., of the third part, and Henry Huthwaite, of &c., of the fourth part: Whereas, by an indenture, dated the 7th day of June, 1844, and made between Thomas Mawson, therein described, of the first part, the said John Biglands of the second part, George Rae, therein described, of the third part, and the said Benjamin Biglands of the fourth part, the customary hereditaments


hereinafter described were duly appointed, conveyed, released and surrendered unto and to the use of the said Benjamin Biglands, his heirs and assigns, by way of mortgage for securing to the said Benjamin Biglands, his executors, administrators, and assigns, payment by the said John Biglands, his heirs, executors, administrators or assigns, of 3600*l.* and interest at the rate and in manner therein mentioned. And whereas by an indenture, dated the 29th day of June, 1844, and made between the said John Biglands of the one part, and the said Benjamin Biglands of the other part, the said customary hereditaments were duly charged with the payment unto the said Benjamin Biglands, his executors, administrators and assigns, of the further sum of 450*l.*, with interest for the same, after the rate and at the time therein mentioned. And whereas there is now due and owing upon the said recited security the principal sum of 3000*l.* only. And whereas the said John Biglands has sold the equity of redemption of the said

It was executed by the said John Biglands, but by no other person. It is admitted that the recitals of the said last mentioned deed are true, and that the said mill and premises were mortgaged by John Biglands, as therein men-

1859.  
CUTHBERTSON  
v.  
IRVING.

customary hereditaments to the said Joseph Cuthbertson for the sum of 3050*l.*: Now this indenture witnesseth, that in consideration of the sum of 3050*l.* to the said John Biglands this day paid by the said Joseph Cuthbertson (the receipt whereof the said John Biglands doth hereby acknowledge), he the said John Biglands, in exercise of all powers enabling him, hereby directs, limits, and appoints, That all the customary hereditaments hereinafter described, with their appurtenances, shall henceforth be and remain to the use of the said Joseph Cuthbertson, his heirs and assigns; and he the said John Biglands Doth hereby grant, bargain, sell, alien, release and surrender unto the said Joseph Cuthbertson, his heirs and assigns all that customary messuage and tenement, hereditaments and premises situate within and parcel of the manor of Little Broughton and Birkby, &c. (describing it). All which said messuage, tenements, &c., hereditaments and premises are now held by Thomas Rae of Lieutenant General Henry Wyndham, lord of the manor of Little Broughton and Birkby, as a customary estate of inheritance and parcel of his said manor, &c., at the yearly customary fineable rent of eight shillings, now apportioned to seven shillings and seven pence. And also the water

corn mill, messuage, dwelling-house and other premises, with tackling, machinery, and other fixtures in the said mill, lately erected by the said John Biglands on the closes called Park Meadow and East Brow, or some part thereof. All which last described closes, inclosures, or parcels of land, hereditaments and premises are now held by the said Thomas Rae of the said Henry Wyndham as a customary estate of inheritance and parcel of his said manor of Little Broughton and Birkby, by payment of the apportioned yearly customary fineable rent of three shillings and sixpence, &c. And all the estate, right, title, interest, customary or tenant right, estate of inheritance, use, trust, property, possession, claim, and demand whatsoever, both at law and in equity, of him the said John Biglands in and to the same: To have and to hold the said hereditaments and all and singular other the premises hereinbefore described, with their and every of their appurtenances, unto and to the use of the said Joseph Cuthbertson his heirs and assigns, according to the custom of the said manor: Subject to and charged and chargeable with the payment of the said principal sum of 3000*l.* due and owing upon and by virtue of the said recited security: And also subject to the said yearly customary

1859.  
  
 CUTHBERTSON  
 v.  
 IRVING.

tioned, in 1844, and prior to the making by him of the lease of 1848. It is also admitted that the premises in question are of the tenure described in the said deed of the 2nd February, 1854.

The defendant paid the rent reserved by the lease of 1848 to the lessor, John Biglands, until the making of the said deed of 1854, and was treated by him as his tenant: after that time and until the end of the term, the defendant paid the rent reserved by the said lease to the plaintiff, and was treated by the plaintiff as his tenant.

No act of interference by the mortgagee appeared to have taken place.

The questions for the Court are—First: Whether the verdict on the second issue is to be entered for the plaintiff or for the defendant. Second: Whether judgment on the demurrer is to be given for the plaintiff or for the defendant.

*Crompton Hutton* argued for the plaintiff (June 23).—First, the verdict on the second issue ought to be entered for the plaintiff. The lease of the 22nd February, 1848, created a reversion in fee by estoppel in John Biglands, which he conveyed to the plaintiff by the indenture of the 2nd February, 1854. In order to create an estoppel two things are requisite: first, the lease must not disclose the title of the lessor; and, secondly, the lessor must have no legal interest in the premises demised. Both these requisites exist in the present case. The lease of the 22nd

fineable rents of seven shillings and seven pence, and three shillings and six pence, and all other rents, fines, &c., due by the custom of the said manor. And also subject, as to the said water corn mill and the closes called East Brow, West Brow, Parkfitt's Mea-

dow, to a lease granted to the said John Irving, dated the 22nd day of February, 1848, for the term of seven years from Lammas Day 1848, and to the covenants, conditions and provisoes therein contained," &c.

February, 1848, does not recite the title of John Biglands; and the indenture of the 2d February, 1854, shews that at the time he granted the lease he was only mortgagor in possession. A reversion in fee by estoppel has all the common law incidents of an estate in fee, and binds all privies in estate, so that both the lessor and his assignee and the lessee and his assignee are precluded from alleging anything contrary to the statements in the lease: *Parker v. Manning* (a). A reversion in fee by estoppel may be defeated by the owner acquiring the legal fee. *Blake v. Foster* (b) shews that where any legal interest, however small, passes by the demise, there is no estoppel. *Gouldsworth v. Knights* (c), 2 Wms. Saund. 418 c, note, and *Webb v. Austin* (d), are authorities that in this case the plaintiff has a good title by estoppel.

Secondly, the plaintiff is entitled to judgment on the demurrer to the fourth plea. The obligation of the defendant to repair, and of the plaintiff to find iron and wood, are independent obligations. [*Udall*, for the defendant, conceded that the plea was bad, but submitted that the declaration was bad for not alleging title in the lessor.] The same objection was taken in *Parker v. Manning* (a); but the Court thought there was no weight in it, and that, if there were, the defendant should have demurred specially.

*Udall*, for the defendant.—First, the plaintiff has no reversion in the premises which entitles him to maintain this action. He is no party to the covenants, and therefore could only sue as assignee of the reversion under the 32 Hen. 8, c. 34; but the lessor had no legal estate in the premises at the time he granted the lease, and consequently there was no reversion to assign to the plaintiff. A party

1859.  
CUTHBERTSON  
v.  
IRVING.

(a) 7 T. R. 537.

(b) 8 T. R. 487.

(c) 11 M. & W. 337.

(d) 7 Man. & G. 701.

1859.

CUTHBERTSON

v.  
IRVING.

who declares in covenant on a demise by himself is not obliged to set out any title; but, in an action by the assignee of the reversion, he must set out the title of the lessor to the demised premises, that it may appear he had such an estate in the reversion as might be legally assigned to the plaintiff: 1 Wms. Saund, 233 a, note, 1 Chit. Plead. 376, 7th ed., Gilbert on Debt, 40d. This plea puts in issue that fact, which is material and traversable: *Carvick v. Blagrove* (a). In *Lennon v. Palmer* (b) *Deherty*, C. J., said:—"In an action of covenant by the assignee of the lessor against the lessee, it is essential that the plaintiff should shew that the lessor demised, and that he had a reversion in the premises capable of being transmitted, and that it was assigned to the plaintiff, and that the plaintiff was seised of the reversion at the time of the breach complained of." [Martin, B.—If the defendant had applied to me at Chambers, I should have compelled the plaintiff to declare in the old form; for this declaration is certainly calculated to embarrass.] The allegation, "whereby the reversion thereof subject to the same term came to and vested in the plaintiff," is a mere conclusion of law, and not traversable. There can be no estoppel for it appears by the plaintiff's evidence that the lessor had no reversion which he could assign. [Martin, B.—In 1 Smith's Lead. Cas. 414 4th ed. it is said:—"Where it appears by the statements in pleading of the assignee himself who seeks to enforce the covenant, that the covenantor had no estate over though it also appears that there was an estoppel which might have been relied upon, the assignee will fail upon his own showing." If this action had been brought before the passing of the Common Law Procedure Act, 1852, the plaintiff must have made proof of the deeds

(a) 11 Mart. 213 S. 1. 1 Ir. 214 & 215.  
(b) 1 Ir. 214 215.

and the defendant would have set them out on oyer, and thereby have shewn that the lessor had merely an equity of redemption. In *Lyn v. Wyn* (a) Sir O. Bridgman said: "In *Noke's Case* (to another purpose reported by my Lord Coke) it was resolved that an assignee of a lease by estoppel shall not take advantage of any covenant (for in truth there was no lease, and so, in truth, he no assignee of that which was not), nor can lessee by estoppel assign anything over." [Martin, B.—That point is discussed in 1 Smith's Lead. Cas. p. 66, 4th ed.] In Com. Dig. "Covenant" (B. 3) it is said, "So, an assignee of a lease, which appears to be good only by estoppel, shall not have covenant: R. Cro. Eliz. 437, Mo. 419." The legal estate in the premises having vested in the mortgagee, and the lessor having a mere equity of redemption, the plaintiff was not assignee of the reversion within the meaning of the issue raised by the plea: *The Mayor of Carlisle v. Blamire* (b), *Doe d. Prior v. Ongley* (c), *Doe d. Pargeter v. Harris* (d), and *Whitton v. Peacock* (e).—He also referred to 2 Smith's Lead. Cas. p. 607.

1859.  
CUTHBERTSON  
v.  
IRVING.

*Crompton Hutton*, in reply, referred to *Sturgeon v. Wingfield* (f), and *Webb v. Russell* (g).

*Cur. adv. vult.*

The judgment of the Court was now delivered by

MARTIN, B.—This is an action of covenant by the plaintiff, the assignee of an alleged reversion, against the defendant, a lessee, for breach of a covenant to repair, and some

(a) Orlan. Bridg. 131.

(b) 8 East, 487.

(c) 10 C. B. 25. 32.

(d) 7 Q. B. 708.

(e) 2 Bing. N. C. 411.

(f) 15 M. & W. 224.

(g) 3 T. R. 393.

1859.

CUTHBERTSON  
v.  
IRVING.

other covenants which in ordinary circumstances would run with the reversion. The declaration, after stating the lease and covenants, alleges that John Biglands, the lessor, by a deed, assigned the premises comprised in the lease to the plaintiff; whereby the reversion thereof, subject to the term created by the lease, came to and vested in the plaintiff. The second plea states that John Biglands did not assign the said premises to the plaintiff, nor had he at the time of the making the lease any reversion of and in the said premises, nor did any reversion in the premises come to the plaintiff. There were other pleas, to one of which there was a demurrer. The issues in fact came on to be tried at the Carlisle Spring Assizes 1859, when the cause was referred to a gentleman at the bar to state a special case for the opinion of the Court.

The following are the material facts stated by him:— John Biglands, being mortgagor in possession, on the 22nd February, 1848, by an indenture of lease, executed by him and the defendant, demised the premises to the defendant for seven years, from the 1st August, 1848, at a rent of 90*l.* per annum. The lease contains the covenants declared on, and they are stated to be made *with John Biglands, his heirs and assigns*. At the time of the execution of the lease the defendant was in possession under a former lease, and has continued in possession during the whole term demised. On the 2nd February, 1854, John Biglands executed a deed, which purported to be made between him of the first part, Benjamin Biglands of the second part, the plaintiff of the third part, and one Huthwaite of the fourth part, which recited that by an indenture of the 7th June, 1844, the premises demised, and others, were conveyed by way of mortgage to Benjamin Biglands to secure a sum of money then unpaid, and that John Biglands had sold the equity of redemption to the plaintiff for 3050*l.* The deed then

witnessed, that John Biglands granted, bargained and sold, aliened, released and surrendered the premises (by the same description as in the lease), and all his estate, right and title, both at law and equity, therein to the plaintiff, to have and to hold to him, his heirs and assigns, for ever, according to the custom of the manor of Little Broughton and Birkby, subject to the customary fineable rent of 3*s.* 6*d.* per annum. The tenure of the land is stated in the deed to be as follows: "All which premises, &c., are now held by Thomas Rae of Henry Wyndham, as a customary estate of inheritance and parcel of his manor of Little Broughton and Birkby, by payment of the apportioned yearly customary fineable rent of 3*s.* 6*d.*;" and it is found by the arbitrator that this is the true tenure, and that the mortgage is truly recited in the deed. The deed was executed by John Biglands, but by no other person. The defendant paid his rent to John Biglands until the execution of the deed, and after that time to the plaintiff; and he was treated by them respectively as their tenant. The questions submitted to the Court are, first, how the verdict as to the second issue is to be entered. Secondly, what the judgment ought to be on the demurrer.

Two points were made by the defendant. It was admitted that the plea demurred to was bad; but it was contended that the declaration was bad also, for not alleging that the lessor was seized of some estate which by assignment would pass to the plaintiff as assignee. The precedents are uniform in containing such an allegation, and the departure from accustomed form is to be deprecated. We think, however, sufficient appears in the declaration to shew that the plaintiff claims to be assignee of an estate in reversion, and therefore this objection would only have been open, if at all, on a special demurrer. As we stated during the argument, the remedy for the defendant was by an application under the 52nd section of the Common Law Procedure Act, 1852.

1859.  
CUTHBERTSON  
v.  
IRVING.

1859.  
CUTHBERTSON  
v.  
IRVING.

The judgment on the demurrer therefore to be for the plaintiff.

The second objection is, that the case shews that the lessor had no legal estate in the premises demised at the time of the lease, and therefore had no estate in reversion to assign; and, consequently, the plaintiff was not an assignee within the meaning of the statute 32nd Hen. 8, c. 34; and as the deed of assignment to the plaintiff, under the old system of pleading, would have shewn on oyer the want of legal title, and the objection would then have appeared on the record, and as now, of necessity, it appeared in evidence on the plaintiff's own case, there could be no estoppel.

Upon consideration, we think the authorities shew that the defendant is estopped from disputing that the lessor was seised of an estate in reversion, and, as there are apt words in the assignment to convey a legal estate in fee in reversion to the plaintiff, the estoppel continues in his favour notwithstanding the assignment to him shews the want of title. The estate in reversion by estoppel was created before the assignment was executed, and in our opinion was not destroyed by it.

It would have been otherwise if the want of title had appeared on the face of the lease itself; in that case, the true facts being there disclosed, there would be no estoppel at all: *Pargeter v. Harris* (a). There are some points in the law relating to estoppels which seem clear. First, when a lessor without any legal estate or title demises to another, the parties themselves are estopped from disputing the validity of the lease on that ground; in other words a tenant cannot deny his landlord's title, nor can the lessor dispute the validity of the lease. Secondly, where a lessor by deed grants a lease without title and subsequently acquires one,

(a) 7 Q. B. 708.

the estoppel is said to be fed, and the lease and reversion then take effect in interest and not by estoppel; and an action will lie by the assignee of the reversion against the tenant on the covenants in the lease, *Webb v. Austin* (a); and by the tenant against the assignee of the reversion: *Sturgeon v. Wingfield* (b). A question which further arises is that in the present case, viz., whether the assignee of a lessor in a lease by deed, who has no estate in the land, has a reversion by estoppel as against the lessee. This question arises not unfrequently, as in the present instance, where a mortgagor makes a lease by deed and assigns his equity of redemption with words that would pass a legal reversion in fee. It seems clearly established, that upon a mortgage of lands, whatever the title of the mortgagor may be, his subsequent possession or occupation is at the will of the mortgagee, and he has nothing in the land whereout any interest can pass to a tenant, so as to affect the right of the mortgagee; and that in the present instance no further or other interest passed to the defendant than by estoppel. Thus far seems plain: but upon the remaining part of the question the authorities unfortunately are not uniform. In the first case on the subject, *Noke v. Auder* (c), it was supposed to be established that covenant never lay by the assignee upon the assignment of an estate by estoppel. This is adopted in Com. Dig. Covenant (B. 3), and in several other books. The question however did not arise, and was not necessary for the decision of the case: see *Palmer v. Ekins* (d), and the note of the learned editor of Smith's Leading Cases, vol. 1, 38 c., *Spencer's Case*. In *Whitton v. Peacock* (e), which was a case out of Chancery sent to the Court of Common Pleas, and where the reasons are not given for the

1859.

CUTHBERTSON

v.

IRVING.


(a) 7 Man. & G. 701, and 8  
Scott, N. R. 419.

(b) 15 M. & W. 224.

(c) Cro. Eliz. 436; Moore, 419.

(d) 2 Lord Raym. 1550.

(e) 2 Bing. N. C. 411.

1859.  
  
 CUTHBERTSON  
 v.  
 IRVING.

judgment; it is to be inferred from the facts and the arguments, that the judgment proceed on the ground that the assignee of a reversion by estoppel could not maintain an action for breach of the covenants in the lease. In a subsequent case, *Gouldsworth v. Knights* (a), *Parke*, B., says, *Whitton v. Peacock* was correctly decided, but not for the reason supposed, but for that the reversion by estoppel was not of a copyhold nature and could not pass by surrender and admittance, and there being no deed by which the reversion by estoppel could pass to the assignee, the judgment was right. (See also the subsequent case of *Webb v. Austen* (b), and the observations there of *Tindal*, C. J., upon the case of *Gouldsworth v. Knights*; and also the elaborate argument in the case of *Pargeter v. Harris* (c), and the dictum of *Wightman*, J., at page 722, "that several cases shew that in leases by estoppel the assignee does not take the legal right to sue on covenants.")

The case of *Carvick v. Blagrove* (d), cited on the argument, only shews that the allegation of the interest of the lessor in the declaration is traversable, and does not affect the present question. Later cases however have laid down that the estoppel on a lease by indenture, where the lessor has no title, extends to the assignee of the lessor and that he takes a reversion by estoppel, and is capable to sue on the covenants in the lease as an assignee of the reversion. The case of *Gouldsworth v. Knights* (a), is to this effect:—"It was a tenancy from year to year: the lessors (trustees) had assigned their interest to the defendant: it was assumed the legal estate was not in them, and a question was raised whether the defendants, assignees of the lessor, could distrain. *Parke*, B., said:—"The tenant is estopped from disputing the title of the old trustees, and is he not estopped

(a) 11 M. & W. 337.

(b) 7 Man. & G. 701.

(c) 7 Q. B. 708.

(d) 1 Brod. & Bing. 531

as to the title assigned to the new trustees?" And this view is assented to and affirmed by the judgment of the Court. In *Sturgeon v. Wingfield* the same view will be found laid down by the same learned Judge. That was a case where the lease by indenture was originally good only by estoppel, and the supposed reversion was assigned to the defendant, together with a subsequently acquired legal term for years which fed the estoppel. His lordship said, that taking it that in point of fact the lessor had no interest originally, there was an estate by estoppel, and that the estate was *primâ facie* an estate in fee simple. *Palmer v. Ekins* (a) was an action by the assignee of the reversion against the lessee for nonpayment of rent. Plea: That the lessee, before making the lease, conveyed his estate to another: it was held that the plea simply amounted to a special "nil habuit in tenementis," and was bad; and Lord *Raymond*, in giving the judgment of the Court, expressly says, "that the assignee shall take advantage of the estoppel." The note of Serjt. *Williams* to *Walton v. Waterhouse*, in 2 Saund. p. 418 a, is, "where the grantor or lessor has nothing in the land at the time of the grant or lease, and therefore no interest passes out of him to the grantee or lessee by the grant or lease, but the title begins by the estoppel which the deed creates between the parties, such estoppel runs with the land" (and it is presumed with the reversion also), "into whose hands soever it comes, whether heir or assignee." We adopt this note as the right statement of the law, and in that the following propositions may be laid down:—First, if any estate or interest passes from the lessor, or the real title is shewn upon the face of the lease, there is no estoppel at all. Secondly, if the lessor have no title, and the lessee be evicted by him who has title paramount, the lessee can plead this and establish a defence to any action brought against

1859.  
CUTHBERTSON  
v.  
IRVING.

(a) 2 Lord Raym. 1550.

1859.

CUTHBERTSON

v.

IRVING.

him: *Doe d. Higginbotham v. Barton* (a); but, thirdly, so long as the lessee continues in possession under the lease, the law will not permit him to set up any defence founded upon the fact that the lessor “nil habuit in tenementis;” and that upon the execution of the lease there is created in contemplation of law a reversion in fee simple by estoppel in the lessor, which passes by descent to his heir, and by purchase to an assignee or devisee. A pleading test may be applied. Had the plaintiff declared that Biglands was seised in fee and demised to the defendant and assigned his reversion to the plaintiff, the defendant could not effectually have traversed the assignment. Could he the seisin? The plaintiff would have made a *prima facie* case by shewing the lease to the defendant, and possession taken and enjoyed under it. The defendant could not have shewn any other estate in Biglands. He must therefore have said Biglands “nil habuit in tenementis.” We are of opinion that the law will not permit him to do so. This state of law in reality tends to maintain right and justice, and the enforcement of the contracts which men enter into with each other (one of the great objects of all law); for so long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee of his lessor, really is. All that is required of him is, that having received the full consideration for the contract he has entered into, he should on his part perform it. For these reasons we think the verdict on the second issue ought to be entered for the plaintiff.

It may be proper to mention that it would appear from the deed of conveyance of the 2nd February, 1854, that the lands were customary lands of a tenure common in Cumberland, and that the legal estate was in Thomas Rae. The estate both of mortgagor and mortgagee would therefore be

(a) 11 A. & E. 307.

equitable estates, and according to the opinion of Baron *Parke*, expressed in *Gouldsworth v. Knights*, the reversion by estoppel would be an estate in fee simple, and it was not contended that the conveyance to the plaintiff was not sufficient to pass such a reversion, had it really existed.

Judgment for the plaintiff.

1859.

CUTHBERTSON  
v.  
IRVING.

BARBER v. POTT.

June 8, 23.

**I**N this action the plaintiff declared for money had and received, money paid and on an account stated. The defendant pleaded "never indebted."—Upon which issue was joined.

The cause came on for trial before *Byles, J.*, at the Liverpool Spring Assizes 1859, when a verdict was, by consent, entered for the plaintiff for the sum of 108*l.* 7*s.* 7*d.*, subject to the opinion of the Court upon the following case:—

The plaintiff is a merchant residing at Liverpool and trading under the firm of "A. Barber & Co." The defendant is the official assignee under the bankruptcy of Thomas E. Pickford, a commission agent, residing at Manchester.

The plaintiff, in the early part of the year 1857, occasionally employed T. E. Pickford to purchase goods for him from different manufacturers; and in the month of August in that year, the plaintiff employed T. E. Pickford to purchase for him on his own account 120 pieces of baize at 69*s.* 6*d.* per piece.

The plaintiff, a merchant at Liverpool, employed P., a commission agent at Manchester, to purchase goods for him. P. purchased goods of various persons, and amongst them, of W. and Co. P. made out invoices in his own name, and drew upon the plaintiff for the amount. There being a balance of 180*l.* 7*s.* 7*d.* due from the plaintiff for goods bought of W. and Co., the plaintiff accepted a bill of exchange drawn by P. for payment

to his order of that amount at three months date. P. not having paid W. and Co. they claimed payment from the plaintiff, but he denied all knowledge of them in the matter. P. became bankrupt. At that time the bill of exchange was in his hands and was taken possession of by his official assignee who indorsed it and deposited it in a bank, pursuant to the provisions of the Bankrupt Law Consolidation Act, 1849. When the bill became due, it was presented by the bankers and paid by the plaintiff W. and Co. afterwards sued the plaintiff for the goods sold by them, and the plaintiff compromised the action. The plaintiff then brought an action against the official assignee to recover back the amount of the bill. — *Held*, that the plaintiff could not recover either for money had and received or money paid to his use.

1859.  
 {  
 BARBER  
 v.  
 POTT.

T. E. Pickford accordingly purchased the baize, as well as certain other goods which he had also been employed by the plaintiff to purchase for him; and sent the plaintiff four several invoices in respect of the baize and other goods which had been so purchased by him on the plaintiff's account.

The first of the invoices, dated the 18th of September, 1857, was for 440*l.* 19*s.*, and comprised 48 pieces of the 120 pieces of baize so ordered as aforesaid as well as other goods. The second invoice, dated 24th of September, 1857, was for 83*l.* 8*s.* 10*d.*, and comprised other goods only. The third invoice, dated the 8th of October, 1857, was for 250*l.* 17*s.* 3*d.*, and comprised the remaining 72 pieces of baize and no other goods. The fourth invoice, dated the 17th of October, 1857, was for 82*l.* 18*s.* 4*d.*, and comprised other goods only. The baizes and other goods were delivered according to the invoices.

T. E. Pickford on the 21st day of September, 1857, sent the plaintiff the following statement of account with reference to the first mentioned invoice:—

|                                         |                         |                                |            |
|-----------------------------------------|-------------------------|--------------------------------|------------|
| Messrs. Barber & Co.                    |                         | 78, George Street, Manchester, |            |
| Liverpool.                              |                         | 21st Sept. 1857.               |            |
|                                         |                         | To                             |            |
|                                         |                         | Thos. E. Pickford.             |            |
| 1857,                                   | To goods as per invoice | £440 19 0                      |            |
| Sept. 18th.                             | " " 1 % extra discount  | 4 8 2                          |            |
|                                         |                         |                                | £436 10 10 |
| E. E. Manchester, 20th September, 1857. |                         |                                | £436 10 10 |
|                                         |                         | Thos. E. Pickford.             |            |

This statement of account was accompanied by a bill of exchange, date 21st September, 1857, drawn by the said T. E. Pickford on the plaintiff, payable six months after date for the said sum of 436*l.* 10*s.* 10*d.* This bill the plaintiff accepted payable at Messrs. Glyn, Mills and Co., London, and returned the same so accepted to T. E. Pickford.

On the 10th October, 1857, T. E. Pickford drew a second

bill of exchange on the plaintiff, payable four months after date, for the sum of 236*l.* 16*s.* 10*d.*, as appears by the statement of account hereinafter set out and enclosed in the letter of the 22nd of October hereinafter mentioned. This bill also the plaintiff accepted payable at Messrs. Glyn and Co., London, and returned it so accepted to the said T. E. Pickford.

1859.  
BARBER  
v.  
POTT.

On the 22nd of October, 1857, T. E. Pickford sent to the plaintiff a letter enclosing a bill of exchange for 180*l.* 7*s.* 7*d.* (which he requested the plaintiff to accept), and the following statement of account :—

|                             |                         |                            |                |
|-----------------------------|-------------------------|----------------------------|----------------|
| Messrs. Alfred Barber & Co. |                         | Manchester, 22nd Oct. 1857 |                |
| To                          |                         | Thos. E. Pickford.         |                |
| Sept. 24.                   | To goods as per invoice | . . .                      | £ 83 18 10     |
| Oct. 8th.                   | " " " "                 | £250 4 0 }<br>13 3 }       | 250 17 3       |
| " 17th.                     | " " " "                 | . . .                      | 82 18 4        |
|                             |                         |                            | <hr/> 417 4 5  |
| By draft drawn formerly     |                         | . . .                      | 236 16 10      |
|                             |                         |                            | <hr/> £180 7 7 |
| By accompanying draft       |                         | . . .                      | £180 7 7       |

T. E. P. Manchester, 22nd Octr. 1857.

The bill of exchange for 180*l.* 7*s.* 7*d.* was dated the 22nd October, 1857, and was drawn by T. E. Pickford on the plaintiff, payable three months after date, to the order of Pickford. This bill the plaintiff accepted payable at Messrs. Glyn, Mills and Co., London, and returned the same so accepted to T. E. Pickford.

There was a custom between T. E. Pickford and the plaintiff, that the former should advise the plaintiff when he procured the discount of any of the acceptances of the plaintiff. This course was usually but not always pursued. T. E. Pickford, by letter dated the 15th October, 1857,

1859.  
 BARBER  
 v.  
 POTT.

advised the plaintiff of his having discounted the two bills for 436*l.* 10*s.* 10*d.* and 236*l.* 16*s.* 10*d.*

T. E. Pickford, in his own name, purchased the 120 pieces of baize of Messrs. Williams, Scott and Co., manufacturers at Manchester, and they had invoiced the baizes to him. None of the other goods comprised in the invoices were purchased of Williams, Scott and Co.

T. E. Pickford not having paid Williams, Scott and Co. for any of the baizes, they obtained from him the name of his principal; and on discovering that the baizes had been purchased on account of the plaintiff, they by letter, bearing date the 19th November, 1857, claimed of the plaintiff payment for the baizes, and inclosed to him the following invoice:—

| 1857.     |                         | £     | s. | d. |
|-----------|-------------------------|-------|----|----|
| Sept. 15. | To Goods. P. B. . . . . | 208   | 10 | 0  |
| Oct. 6.   | " " " . . . . .         | 208   | 10 | 0  |
|           |                         | <hr/> |    |    |
|           |                         | £417  | 0  | 0  |
|           |                         | <hr/> |    |    |

Terms:—Approved bills at 3 months in 14 days or 1½ % cash.

The plaintiff wrote letters to Williams, Scott and Co. on the 20th and 23rd of November, 1857, denying knowledge of them in the matter, and denying all liability to them, and refusing to pay.

On the 10th December, 1857, T. E. Pickford was adjudicated bankrupt by the Manchester Court of Bankruptcy.

The bill of exchange for 180*l.* 7*s.* 7*d.* remained in the hands of T. E. Pickford up to the time of his bankruptcy, and was then taken possession of by the defendant, being official assignee, who indorsed the bill in the manner following—"Jas. S. Pott, official assignee to the estate of T. E. Pickford,"—and deposited the same in the Bank of England at Manchester (that being the proper bank into

which an official assignee under a bankruptcy in the Manchester Court of Bankruptcy should pay money or bills belonging to such bankrupt's estate), to the credit of the Accountant in Bankruptcy for the estate of the bankrupt. It became due on the 25th January, 1858. The plaintiff had, some days before, provided Messrs. Glyn, Mills and Co. with funds to pay that bill, as well as other acceptances of the plaintiff payable at their bank. Accordingly the said bill for 180*l.* 7*s.* 7*d.* was paid on presentment, as well as the other bills, in the regular course of business.

No evidence was given that, at the time when the bill of exchange for 180*l.* 7*s.* 7*d.* was presented and paid, the plaintiff was aware that the bill had remained in the hands of T. E. Pickford at the time of his bankruptcy, or that the defendant had taken possession of it, unless the Court think that it is to be inferred from any facts herein stated. The presentment of the bill for 180*l.* 7*s.* 7*d.* was made by the Bank of England, to whom the same had been sent for that purpose by the Bank of England at Manchester, and the amount remitted by the Bank of England to the Bank of England at Manchester, who placed the amount to the credit of the said Accountant in Bankruptcy for the estate of the said bankrupt.

Williams, Scott and Co. commenced an action against the plaintiff on the 7th of May, 1858, to recover the said sum of 417*l.*, the amount of their aforesaid claim. The plaintiff defended the action for some time, but on the 12th of August, 1858, paid Williams, Scott and Co. the sum of 375*l.* in settlement of their claim.

The amount claimed by the plaintiff in the present action is the amount of the bill for 180*l.* 7*s.* 7*d.* so paid as aforesaid by Glyn and Co. on account of the plaintiff to the Bank of England.

The question for the opinion of the Court is, whether

1859.  
BARBER  
v.  
POTT.

1859.

BARBER

v.  
PORT.

the plaintiff is entitled to recover from the defendant the said sum of 180*L* 7*s*. 7*d*., or any part thereof. If “yea,” the verdict, which has been entered for the plaintiff, is to stand for the said sum, or for so much thereof as the Court may think fit. If “nay,” the verdict entered for the plaintiff is to be set aside, and a verdict entered for the defendant.

The Court is at liberty to draw any inferences of fact.

*Manisty* (*Baylis* with him), for the plaintiff.—It is an established rule of law, that where a person employs an agent to purchase goods for him, and the seller deals with the agent, supposing him to be a principal, although the seller has debited the agent, he may, upon discovering the principal, resort to him for payment: *Thomson v. Davenport* (a). Applying that rule to this case, the plaintiff, as an undisclosed principal, was liable to Williams, Scott and Co.; and, having been compelled to pay them, he is entitled to recover back from the defendant the 180*L* 7*s*. 7*d*. which he paid in respect of the bill of exchange given to Pickford. [*Martin*, B.—Suppose the plaintiff had given Pickford money to pay for the goods, could Williams, Scott and Co. have recovered against the plaintiff?] *Heald v. Kenworthy* (b) decided that, where a principal authorizes his agent to pledge his credit, and the latter makes a purchase on his behalf and thereby creates a debt, the principal is not discharged by payment to the agent if the money is not paid over to the seller, unless the latter by his conduct makes it unjust that the principal should be sued; as, for example, where the seller by his words or conduct induces the principal to believe that a settlement has been come to between the seller and the agent, in consequence of which the principal pays the amount of the debt to the agent. Here, Pickford merely held the bill as the plaintiff’s agent,

(a) 9 B. &amp; C. 78.

(b) 10 Exch. 739.

and for the purpose of paying his debt to Williams, Scott and Co. At the time of Pickford's bankruptcy it was not discounted, and he had no equitable title to it which would pass to his assignees. The defendant, when he deposited the bill in the bank, should have given the plaintiff notice of the deposit, in pursuance of the 41st section of the 12 & 13 Vict. c. 106.

1859.

BARBER  
v.  
POTT.

*Wilde* (*Aspland* with him), for the defendant.—The bill was not given to Pickford for the purpose of discharging any debt due to Williams, Scott and Co., but upon a running account in respect of goods bought by Pickford and invoiced to the plaintiff. When Williams, Scott and Co. called upon the plaintiff to pay for the goods, he refused, alleging that the transaction was between him and Pickford; and when the bill became due he paid it. That was a voluntary payment, with full knowledge of all the circumstances, and consequently the money cannot be recovered back: *Gibson v. Bruce* (a). It is incumbent on the plaintiff to establish that, when he paid the bill, it was in the hands of the bank under such circumstances that he had no defence to their claim: *Bradshaw v. Bradshaw* (b). It is not, however, shewn that he was under any obligation to pay the bill. The defendant, as official assignee, dealt with the bill in manner required by the 39th and 41st sections of the Bankrupt Law Consolidation Act, 1849, and therefore an action for money had and received will not lie against him: *Munk v. Clarke* (c), *Priestley v. Watson* (d), *Horsfall v. Handley* (e). Money paid will not lie because there is no privity between the defendant and the plaintiff.

*Manisty*, in reply.—*Bize v. Dickason* (f) is an authority

(a) 5 Man. &amp; G. 399.

(b) 9 M. &amp; W. 29.

(c) 10 Bing. 102.

(d) 2 C. &amp; M. 691.

(e) 8 Taunt. 136.

(f) 1 T. R. 285.

1859.

BARBER

v.

POTT.

that an action for money had and received will lie in this case. Then, with respect to the count for money paid, the indorsement of the bill by the defendant was, in effect, a request to pay it to the indorsees. If this had been an accommodation bill in the hands of the bankrupt, the plaintiff might clearly have recovered the amount as money paid for his use; and, there being no consideration for the bill, it is the same as an accommodation bill. Neither the bankrupt nor the defendant had any right to any part of the money, and the case is the same as that of a bill delivered to the bankrupt for a special purpose. There is a privity between the plaintiff and defendant arising out of the manner in which it was obtained and the circumstance of its being indorsed, when there was nothing due from the plaintiff: *Bleaden v. Charles (a)*.

MARTIN, B.—We are all of opinion that the plaintiff is not entitled to recover. The facts are these:—The plaintiff, a merchant at Liverpool, employed one Pickford, a commission agent at Manchester, to purchase goods for him. Pickford bought goods of various persons, and amongst others of Williams, Scott and Company; and the way in which he dealt, was, to make out invoices of the goods in his own name and draw upon the plaintiff for their amount: therefore, so far as appeared by the documents, Pickford was the seller and the plaintiff the buyer of the goods. In October, 1857, there was a balance due from the plaintiff of 180*l.* 7*s.* 7*d.* for goods which had been purchased of Williams, Scott and Co., and on the 22nd October the plaintiff accepted a bill of exchange, drawn by Pickford, for payment to his order of that amount three months after date. Pickford not having paid Williams, Scott and Co. for the goods, they claimed payment from the plaintiff; but

(a) 7 Bing. 246.

he denied all liability to them. On the 10th December, 1857, Pickford became bankrupt. At that time the bill of exchange was in his hands, and it was taken possession of by the defendant, his official assignee, who indorsed it and paid it into the proper bank, according to the directions of the Bankrupt Act. The plaintiff was possibly not bound to pay the bill; and, assuming that he had a good defence to an action upon it, he has not thought proper to avail himself of it, but has voluntarily paid the money to a person claiming it as a matter of right, and with full knowledge of all the facts. It is a clear principle of law that money so paid cannot be recovered back, and this is a complete answer to any action against the defendant to recover back the amount so paid. Then, what subsequently occurred? Williams, Scott and Co. sued the plaintiff for the goods sold, and he thought fit to compromise that action. If the plaintiff was in the situation of a surety for Pickford, his right of action would be, not against the defendant, but against Pickford. It therefore seems to me that no action either for money had and received, or money paid, can be maintained in this case. I also think that the doctrine laid down in *Thomson v. Davenport* (a) applies; viz. that if the principal has paid the agent, or if the state of accounts between them would make it unjust that the seller should call upon the principal for payment, that would be an answer to the claim. Therefore Williams, Scott and Co. could not resort to the plaintiff after he had paid Pickford. I decline, however, to give judgment on that ground, since it is an answer to the action that the payment of the bill was a voluntary payment, with full knowledge of all the circumstances.

1859.

BARBER  
v.  
POTT.

BRAMWELL, B.—I am also of opinion that our judgment

(a) 9 B. & C. 78.

1859.

BARBER  
v.  
POTT.

ought to be for the defendant, on the ground that the plaintiff has no cause of action. I give no opinion as to whether Williams, Scott and Co. could have enforced their claim against the plaintiff. Assuming that they could, still this action is not maintainable, because at the time the plaintiff paid the bill he knew that it was in the hands of the official assignee, and he paid it voluntarily. That being so, it is a well known rule of law that a person who voluntarily pays money to another cannot recover it back. If Pickford had continued solvent, and the plaintiff had paid him the amount of the bill, probably the plaintiff would have been at liberty to say to Pickford, "I gave you this money to pay Williams, Scott and Co., and not having done so I am entitled to call upon you to give it me back." But under existing circumstances all he could have said to the defendant is, "I gave a bill for money which I thought I owed Pickford, and you are his assignee and have possession of the bill." Therefore this case cannot be decided in favour of the plaintiff by saying that if Pickford had received the money it might have been recovered back from him. It appears to me that this was a voluntary payment by the plaintiff to the defendant of money which the plaintiff might have refused to pay, and having paid it he cannot recover it back again.

WATSON, B.—I am of the same opinion. Looking at all the circumstances, there can be little doubt. On the 22nd October, 1857, an account having been stated between the plaintiff and Pickford, this bill was given for that specific account. On the 19th November, Williams, Scott and Co. made a claim upon the plaintiff for the amount of the goods sold by them, and on the 20th and 23rd the plaintiff wrote letters denying all liability to them. On the 10th December, 1857, Pickford became bankrupt. At this time the

bill was in his hands, and his official assignee took possession of it as part of his estate. The plaintiff had knowledge of all these circumstances, and he knew whether he had authorized Pickford, as his agent, to purchase of Williams, Scott and Co., so as to make him liable to them. When the bill was presented to him he must have known that it had never been in circulation, because there was no indorsement upon it except that of the official assignee; therefore with full knowledge of all the facts he elected to pay it. Then is he entitled to recover the money? Now, it is a clear rule of law that if a person, with the knowledge of all the facts, voluntarily pays money, he has no right to recover it back again. If a person pays money under compulsion when he is not bound to pay it, he may recover it in an action for money paid to his use. But how does that apply here? If this money was paid to the use of anybody it was paid to the use of the bankrupt, who ought to have paid Williams, Scott and Co. I therefore think that neither the action for money had and received nor for money paid will lie.

1859.  
 BARBER  
 v.  
 POTT.

Judgment for the defendant.

THE ATTORNEY GENERAL v. SULLEY.

June 23.

**INFORMATION.**—That the defendant, before and at the several times hereinafter mentioned, was one of several S. was a partner in the firm of L., L. and Co.; he resided at

Nottingham, the other partners residing at New York in the United States, where their principal business was carried on. At Nottingham the defendant transacted the business of the firm in England which consisted of purchasing and shipping goods for exportation. No money was received in England except from New York. The profits were made by the resale of goods at an increased price in America. A large part of the profits of the firm in America was made by the resale of goods purchased in America, France and Germany.

*Held*:—First, that the firm was liable to pay income tax upon the profits realized in America upon the resale of goods purchased in England and exported from thence.

Secondly.—That S., the partner resident in England, was bound to make a return of such profits on behalf of the firm.


1859.  
ATTORNEY  
GENERAL  
v.  
SULLEY.

persons carrying on jointly and in copartnership a certain general trade or business, to wit, of general merchants and dealers, in Great Britain, to wit, at the North Ward South in the county of the town of Nottingham, under the name, syle and firm of Lottimer, Large and Co.: and that the defendant, &c., before and at the several times resided at — in Nottingham. And that the other persons so carrying on the said trade and business, and whose names are unknown, before and at the several times hereinafter mentioned, resided in parts beyond the seas, and not within or in any part of the United Kingdom of Great Britain and Ireland, to wit, at New York, in the United States of America. That the said copartnership, before and at the several times hereinafter mentioned, were chargeable and liable for and in respect of certain of the duties imposed (by 16 & 17 Vict. c. 34; 17 & 18 Vict. c. 10; 17 & 18 Vict. c. 24, and 18 & 19 Vict. c. 20), for the year ending on the 5th of April, 1856, in respect of certain profits and gains arising to them as such copartnership, according to Schedule (D.) of the first mentioned Act, the said trade having been so carried on for more than three years next before, and ending on the 5th of April, 1856: and that after the passing of the said Acts, and within the time directed by the precept of the Commissioners, one Thomas Underwood, then being an assessor of the duties by the said Act imposed in and for the said ward within which the said E. Sulley so resided, for the year ending on the 5th of April, 1856, did as such assessor leave at the dwelling-house and place of residence of the said Edward Sulley, within the said ward, a certain notice, such as by the said Acts and the Acts incorporated therewith, or referred to therein, is required, signed by him, and requiring the said E. Sulley to prepare and deliver to the said assessor, or at the office of the Commissioners of the district at King's Place, in Nottingham, in manner by the

said Acts directed a list, declaration, and statement which the said E. Sulley was required to deliver by the said Acts, within a certain time, in the said notice mentioned in that behalf: and although the said E. Sulley, according to the said Act, was liable to prepare, make out and deliver, and could and might and ought to have prepared, made out and delivered to the said assessor, or at the office of the said Commissioners, a true and correct statement, such as by the said Acts is required, stating, amongst other things, the balance of the profits and gains arising to the said copartnership from the said trade and business so by them carried on as aforesaid, and in respect of which said balance of profits and gains certain of the duties by the said Acts imposed for the year ending on the 5th of April, 1856, under Schedule (D.) of the said first mentioned Act, were then chargeable and payable to her Majesty: and although the time in the said notice has long since elapsed, of which E. Sulley had notice, yet the said E. Sulley did not prepare, make out and deliver to the said assessor, or the Commissioners duly authorized to receive the same, or to their clerk, &c., such a statement as aforesaid, or any list, declaration or statement whatsoever, &c., contrary to the said Acts; whereby and by force of the statutes, &c., the said E. Sulley, not having been assessed in treble the duty at which he ought to be charged, has for his said offence forfeited the sum of 50*l*.

Plea.—The general issue.

The question was raised by a special verdict which stated, that after the passing of 18 & 19 Vict. c. 20, on the 6th of April, 1855, and from thence until the exhibiting the information, the defendant resided in Great Britain, at the parish of Lenton, in the county of Nottingham, and did, during all that time, under the name, style and firm of “Lottimer, Large and Co.” carry on business in copartnership with six other

1859.  
  
 ATTORNEY  
 GENERAL  
 v.  
 SULLEY.

1850.  
~~~~~  
ATTORNEY  
GENERAL  
S.  
SCILEY.

persons, all of whom did, during all that time, reside in New York, in the United States of America, and not within the United Kingdom, in manner following: viz. they have a place of business at New York, in the United States of America, where they carry on business under the name of "Lottimer, Large and Co.;" and they also have a place of business within the North Ward Sooth, in Nottingham (in which neighbourhood the defendant dwells), consisting of a counting-house and warehouses, with the name of "Lottimer, Large and Co." on the door, and which are occupied by the defendant, and by clerks and servants employed by him on behalf of the said copartnership, for the purpose of carrying on the business of the copartnership in England. Books of account are kept at the place of business, which merely shew the purchases, warehouse expenses, and the remittances made from New York to pay these items. No monies are ever received in England except from New York. The copartnership has a banking account in their name of "Lottimer, Large and Co.," with the Nottingham and Notts Banking Company in Nottingham. The business of the copartnership in England is carried on by the defendant and other persons purchasing for the said firm goods at Nottingham and elsewhere in England, and shipping them for exportation. All goods are sent direct to the port, except Nottingham goods and small quantities insufficient in themselves for a package. The goods so purchased are in some cases sent direct by the vendors, on behalf of the said copartnership, to the nearest port in England and are then shipped for exportation; and in other cases are sent by the vendors to Nottingham to the said place of business there of the said copartnership, and are there packed and afterwards exported by the defendant on account of the said copartnership. The goods so purchased are in no case manufactured or

resold in England prior to their shipment and exportation, nor is any profit made by the said copartnership by means of any manufacture or resale of goods in England; the profits of the said copartnership, in respect of goods purchased in England, consisting entirely of the increase in price or value obtained by the resale in America of such goods so purchased by them in England and exported as above mentioned. A large part of the profits of the business carried on by the said copartnership at New York aforesaid, is obtained from goods purchased in France, Germany and America. Remittances are from time to time made by the copartnership at New York to defendant, and by him paid to the said bankers at Nottingham to the credit of the copartnership; and payment for the goods purchased in England, and for the cost of packing, shipping and exporting such goods, and for the current expenses of the said business premises of the copartnership at Nottingham, and of carrying on so much of the said business as is carried on in England, is made by means of checks drawn by the defendant for and in the name of the said copartnership on the said bankers at Nottingham.

It was further found that profits and gains have arisen and accrued to the copartnership from the trade so by them carried on during the year ending the 5th of April, 1856, and during each of the two preceding years (the trade having been during all that time carried on), to a large amount, viz. 10,000*l*. And that, if all the persons of whom the copartnership consisted had resided in the United Kingdom, or if the business of the copartnership had been wholly exercised within the United Kingdom, the copartnership would have been chargeable and liable jointly and in one sum for and in respect of the duties mentioned in Schedule (D.) of the first mentioned Act, for the year ending on the 5th of April, 1856, in respect of their said

1859.

ATTORNEY  
GENERAL  
v.  
SULLEY.

1859.  
 ~~~~~  
 ATTORNEY  
 GENERAL  
 v.  
 SULLEY.

profits and gains. And further, that after the passing of the Acts and within the time limited by the precept of the Commissioners, viz., on the 1st of May, 1855, T. Underwood, an assessor in and for the ward within which the defendant carried on the said business for the year ending on the 5th of April, 1856, did, as such assessor, leave at the said place of business of the defendant and personally deliver to him, within the said ward, a notice requiring the defendant to prepare and deliver to him within a certain time a list, declaration and statement which should contain, amongst other things, an account and return of the profits and gains arising to the copartnership of Lottimer, Large and Co., in respect of the business so by them jointly carried on as aforesaid made and stated by and on behalf of him the defendant, and the several other persons so as aforesaid forming and constituting the same copartnership, jointly and in one sum, and separately and distinctly from any other duty chargeable on the same persons or either or any of them. And that, although the time for the defendants complying with the said notice, &c., elapsed before the exhibiting of this information, the defendant has always neglected to prepare such return. And that the defendant has not been assessed in treble the duty at which he ought to be charged by virtue of the said Acts, in case he ought by law to have prepared and delivered such an account and return. But whether or not, &c.

*The Attorney General* (Sir *F. Kelly*), with whom was *Beavan*, argued for the Crown (a).—The question is, whether a mercantile firm of seven partners, of whom six reside at New York and one in this country, is liable to be assessed to the income tax, in respect of the profits of the firm, under

(a) In Trinity Term, June 16. Before *Pollock*, C. B., *Martin*, B., and *Watson*, B.

the 5 & 6 Vict. c. 35. The trade consists of buying and selling. The buying is carried on here ; the selling at New York. The member of the copartnership residing here has a warehouse or counting-house for his clerks, but only for the purposes of buying goods, which are exported and sold in a foreign country. By the 16 & 17 Vict. c. 34, s. 2, it is enacted, that the duties shall be deemed to be granted and made payable yearly in respect of the several properties, profits and gains comprised in Schedule (D.), "in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom, from any profession, trade, employment or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere." By this the duty is imposed on all persons residing in the United Kingdom ; and it applies to all trades carried on by such persons either within or out of the Kingdom. Under this part of the Schedule the partner resident here would be chargeable. The Schedule goes on to make duties payable "in respect of the annual profits or gains arising or accruing to *any person whatever*, whether a subject of her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment or vocation exercised within the United Kingdom." This would impose duties on the partners resident in America, in respect of their business carried on here, subject to the question, whether a trade carried on partly here and partly in America is included? The fifth section of the 16 & 17 Vict. c. 34 provides that the duties thereby granted shall be assessed, raised, levied and collected under the regulations and provisions of the 5 & 6 Vict. c. 35. By the 100th section of the last mentioned Act: "First Case. —Duties to be charged in respect of any trade," &c. Rule second. "The duty shall extend to every person, body


1859.

ATTORNEY  
GENERALv.  
SULLEY.

1859.  
 ~~~~~  
 ATTORNEY  
 GENERAL  
 v.  
 SULLEY.

politic or corporate, fraternity, fellowship, company or society, and to every art, mystery, adventure or concern, carried on by them respectively, in Great Britain or elsewhere." That is intended to guard against any distinction in assessing the duties on firms or individuals. In the same section, by Rule the Third of the "*Rules applying to both preceding cases*," it is provided that "the computation of duty arising in respect of any trade, manufacture, adventure or concern, &c., carried on by two or more persons jointly, shall be made and stated jointly and in one sum, and separately and distinctly from any other duty chargeable on the same persons or any or either of them: and the return of the partner \* \* who shall be resident in Great Britain (and who is hereby required, under the penalty herein contained for default in making any return required by this Act, to make such return on behalf of himself and the other partners, &c.), shall be sufficient authority to charge such partners jointly." It then provides that if no partner resides in Great Britain, their agent shall make a return. Thus, in the present case, if all the partners resided at New York their agent would have been bound to make a return. The Fifth Rule also shows how the return should have been made by the defendant for his partners, as well as for himself. Any doubt that might exist as to whether the duties are charged in respect of a trade carried on partly in one country and partly in another, is set at rest by section 106, which provides that every person engaged in any trade, manufacture, adventure or concern, shall be charged by the Commissioners acting for the parish where such trade shall be carried on, whether such trade shall be carried on *wholly or in part only* in Great Britain. The words in this section, "where such trade shall be carried on," include trading carried on partly here and partly abroad. Acts of buying alone are sufficient to constitute a trading, though no goods

be sold in the country. *Allen v. Cannon* (a) shews that such a trading will render the trader liable to the bankrupt laws. *Alexander v. Vaughan* (b) and *Bird v. Sedgwick* (c) are to the same effect. It may be said that the profits consist of money received in the United States. But profit consists in buying at one price and selling at a higher price. The difference between the buying and the selling price is the profit. Buying and selling are both essential to the making of profits by trading.

1859.  
  
 ATTORNEY  
 GENERAL  
 v.  
 SULLEY.

*R. E. Turner*, for the defendant.—The partners of the firm of Lottimer, Large and Co., resident at New York, are not liable to be assessed to the income tax in this country, and therefore the defendant is not liable under the 5 & 6 Vict. c. 35, s. 55, for having omitted to make a return of their profits. The question is, whether a trade can be said to be exercised in the United Kingdom, which consists only in buying goods here. Suppose the owners of an iron foundry in the United States employed a person to buy coals here for the use of their furnace, would that be a trading here so as to render them liable to income tax? [*Martin*, B.—Probably not, because their trade does not consist in buying and selling coals.] The words of Schedule (D.) of 16 & 17 Vict. c. 34, “profits or gains arising or accruing to any person residing in the United Kingdom,” shew that under the first clause of Schedule (D.) the defendant is only chargeable in respect of his own share of the profits. As to the second clause, the duties are granted in respect of trades, &c. “exercised within the United Kingdom.” A trade is exercised or carried on where the principal business of the firm is carried

(a) 4 B. & Ald. 418.

*desworth v. Anderson*, Sir T. Raym.

(b) Cowper, 398.

375.

(c) 1 Salk. 110; and see *Dod-*

1859.  
 ~~~~~  
 ATTORNEY  
 GENERAL  
 v.  
 SULLEY.

on, or where the money profits are realized. Acts imposing duties should be construed strictly. [*Watson, B.*—Suppose a merchant buys wines abroad, at Bordeaux, and imports them into London, he carries on business at Bordeaux. Carrying on business does not consist only in realizing the profits.] Here nothing is sold in this country. There is no interchange of commodities, as would probably be the case in the instance put. “Exercised within the United Kingdom” means a complete exercise of the trade here.

*The Attorney General*, in reply.—When that which constitutes the trade is buying and selling, each person who takes part in either operation is a trader. If the defendant’s argument were well founded, the seven gentlemen in question are traders neither here nor in America.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

MARTIN, B.—The learned counsel on both sides in this case have stated to us, in writing, the question upon which they desire our judgment, viz., whether the defendant is liable to make a return of the whole of the profits earned by the firm of which he is partner, by the exportation of goods from England, and the sale of them in the United States, for the purpose of assessing the whole firm to the income tax. The material facts stated in the special verdict are these: The defendant was a partner in a firm of Lottimer, Large and Co. He resided near Nottingham, the other partners resided at New York, in the United States of America. The firm had a place of business there, and also a place of business at Nottingham, viz., a counting-house and warehouse. The name of the firm was over the door, and they had clerks and servants to carry on the business, and had a banking account with the Nottingham

and Notts Banking Company. Books were kept at Nottingham, but they merely shewed the purchases in England, the warehouse expenses and the remittances from New York. No money was ever received in England, except from New York. The business of the firm in England was carried on by the defendant and others purchasing and shipping goods for exportation ; all the goods were shipped, and none were manufactured or resold in England. No profits were made in England ; the profits arose from the increased prices obtained on the resale of the goods in America. A large part of the profits of the firm was obtained by the resale of goods in America, purchased there and in France and Germany. Remittances were from time to time made from New York, and were paid to the Nottingham and Notts Banking Company. The goods purchased, and the expenses of the establishment incurred in England, were paid for by checks drawn by the defendant in the copartnership name. The substantial question is, Whether the firm are liable to pay income tax upon the profits earned by them on the sale of goods in America, bought in and exported from England in manner above mentioned.

In the writing signed by the learned counsel it is admitted that the defendant is liable to pay income tax upon the whole of the profits which he received from the business of the firm, and the first part of Schedule (D.) in the second section of the 16 & 17 Vict. c. 34, is conclusive upon the point.

The point in controversy depends upon the second part of the same Schedule : by it the duty *is granted for and in respect of the annual profits accruing to any person whatsoever, whether a subject of her Majesty or not, and although not resident within the United Kingdom, from any trade exercised within the United Kingdom, and to be charged for*

1859.

ATTORNEY  
GENERAL  
v.  
SULLEY.

1859.  
ATTORNEY  
GENERAL  
v.  
SULLEY.

every 20s. of the annual amount of such profits. Now supposing the firm in question was composed of a single individual, and he resided in New York and employed an agent in England who acted in the same manner in the purchase of goods as the defendant did, we think there is no doubt that he would exercise a trade within the United Kingdom—he would exercise in England the trade of buying goods for exportation and resale, though the resale was out of England, a well known and extensive trade. There is a provision made in the 100th section of the 5 & 6 Vict. c. 35, for the return or statement to be made under such circumstances. In the present case a partner was the acting manager, and we think it quite clear that every exercise of the trade by him is an exercise of it by the whole firm of which he is a member, and that they all exercise it within the United Kingdom. This is corroborated by sect. 106 of 5 & 6 Vict. c. 35, by which it appears that there may be a trade carried on partly in and partly out of the United Kingdom, and yet be within the enactment. It was said that the buying without selling was not trading, but we think buying, in the manner stated in the special verdict, with the intention of selling, was trading. The cases cited on the argument shewed that the defendant was subject to the bankrupt laws as a trader. Suppose the question asked, “Did the defendant carry on trade?” the obvious answer would be in the affirmative, that “he carried on the trade of buying goods for exportation.”

The third rule of the third set of rules to the 100th section of the same statute shews how the return or statement is to be made. It must be made by the defendant being the partner resident in Great Britain, and in one sum; but upon payment credit should be given for the payments made by the defendant in respect of his part of the profits in the English trade, he being charged with that in the

amount of duty imposed upon himself by the first part of the Schedule (D.); or perhaps the better way would be that the firm should be assessed for the profits of the English trade, and the defendant separately for his share of the German, French and American profits.

For these reasons we are of opinion, in answer to the question submitted to us, that the defendant is liable to make a return of the whole of the profits earned by the firm of which he is a partner, by the exportation of goods from England on the sale of them in the United States, for the purpose of assessing the whole firm to the income tax.

### Judgment for the Crown.



CORNMAN *v.* THE EASTERN COUNTIES RAILWAY COMPANY.

June 22.

**D**ECLARATION.—That the defendants, at the time of the grievances, were the owners of a railway on which they were used and accustomed to carry passengers and parcels for hire, and were also possessed of a railway station and platform abutting on the railway, upon, along, and over which all persons lawfully being at the said station were used and accustomed and were authorized by the defendants to pass and repass; and whereas, at the time of the committing of the grievances, the plaintiff was expecting and about to receive a parcel then carried by a certain train by the defendants at their request for reward, and to receive

The defendants, a railway Company, had on their platform, standing against a pillar which passengers passed in going to and coming from the trains, a portable weighing machine, which was used for weighing passengers' luggage, and the foot of which projected about six inches above

the level of the platform. It was unfenced and had stood in the same position, without any accident having occurred to persons passing it, for about five years. The plaintiff, being at the station on Christmas day inquiring for a parcel, was driven by the crowd against the machine, caught his foot in it and fell over it.—*Held*, that there was no evidence of negligence to go to the jury on the part of the company, the machine being in a situation in which it might have been seen, and the accident not being shewn to be one which could have been reasonably anticipated.

1859.

ATTORNEY  
GENERAL  
*v.*  
SULLEY.

1859.

ATTORNEY  
GENERAL  
v.  
SULLEY.

every 20s. of the annual amount  
supposing the firm in question  
individual, and he resided in  
agent in England who acted  
purchase of goods as the  
no doubt that he would  
Kingdom—he would  
ing goods for export  
out of England  
is a provision  
Vict. c. 35

such circumstances

acting

exercise

firm

:

on account of the defendants' careless and negligent  
conduct and want of due precautions cast and thrown on  
the weighing machine, &c.

Plea, not guilty.

At the trial before *Channell, B.*, at the London Sittings  
in Trinity Term, the plaintiff proved that on the 25th of  
December, 1858, he went to the luggage counter, at the  
arrival platform of the defendants' railway, to get a parcel,  
and while he was standing there a train arrived; the pas-  
sengers from the train, who were very numerous, pressed  
him forward, and he was driven against a weighing machine  
on the platform which he did not see; his foot caught the  
corner of the machine; he fell and broke his kneecap.  
The machine stood against a pillar; he would not have  
fallen had the machine not been there. It was proved that  
when there were large numbers of passengers they passed on  
each side of the weighing machine. A witness stated that  
at the Great Northern, North Western, Great Western,  
South Eastern and South Western Railway Stations the


weighing machines are flush with the floor. At the Great Western Station they are inclosed by railings. The weighing machine which was used for weighing passengers' luggage had been in the same situation for five years. It was a portable machine, which is convenient for weighing passengers' goods. A model was produced shewing that the foot on which goods were placed for the purpose of being weighed was six or eight inches above the level of the floor of the platform.

The learned Judge told the jury that the weighing machine was a thing which any person on the platform might have an opportunity of seeing, and therefore that the case did not resemble that of accident from falling into an unfenced hole; that one Company was not bound to adopt all the arrangements of another: and he asked them whether they thought that the machine was so constructed, and in such a position as that, without any negligence of persons coming on the platform, accidents might occur. The jury found a verdict for the plaintiff. Leave was reserved to the defendants to move to enter a nonsuit if the Court should be of opinion that there was no evidence to go to the jury.

*Ballantine*, Serjt., having obtained a rule nisi accordingly,

*Parry*, Serjt. and *H. James* now shewed cause.—Upon the pleadings it must be taken that the plaintiff was lawfully on the platform with the consent of the defendants. It was negligence in the Company to place a weighing machine in such a position that persons on the platform are liable to sustain injury by being driven against it by the pressure of great crowds, such as might naturally be expected to congregate in such a place at certain times. The verdict of the jury shews that the plaintiff did not

1859.  
CORNMAN  
v.  
EASTERN  
COUNTIES  
RAILWAY CO.

1859.  
  
 CORNHAN  
 v.  
 EASTERN  
 COUNTIES  
 RAILWAY CO.

contribute to the accident by any negligence of his own. [*Bramwell*, B.—In a case against the South Eastern Railway Company, tried before me, in which my brother *Hill* was counsel for the Company, two flaps on the platform had been imperfectly turned back; the plaintiff passing along the platform tripped, and fell in. I suggested that there was no defence; he was so entirely of that opinion, that he submitted to a verdict.] If a dangerous bridge fall in, it would be no answer to an action for negligence against the person who put it up that ninety-nine persons had previously passed over it, if it gave way with the hundredth. In *Martin v. The Great Northern Railway Company* (a), the plaintiff, in running along the platform of the railway to get into the train, fell over a switch handle; it was held that there was evidence of negligence on the part of the defendants. The plaintiff there was on a part of the platform where he ought not to have gone. [*Bramwell*, B.—That case will not help this plaintiff, because there was evidence that there was not light enough to enable a person unacquainted with the premises to move about in safety. *Watson*, B.—I have always thought that decision wrong, but perhaps it may be supported on that ground.] In *Southcote v. Stanley* (b) the distinction between a visitor and a person invited as a customer into a shop, or a passenger to a railway station, was adverted to; but it was said that a person in the house of another, either as a visitor or on business, has a right that the owner of the house shall take reasonable care to protect him from injury, for instance that he shall not allow a trap-door to be open through which the visitor may fall. The public in general know that the platform is above the rails; therefore they would be on their guard against falling off the platform. The real question is, whether the property of the defendants was so arranged as to be likely to produce danger to a

(a) 16 C. B. 179.

(b) 1 H. & N. 247.

person situated as the plaintiff was. [*Bramwell*, B.—In a case in which I was counsel, the plaintiff came to a shop to measure a picture for a frame, and followed the defendant over a counter. He dropped through a skylight. There was a verdict for the plaintiff, and a rule to enter a nonsuit was refused. The difficulty here is that the Company could not have reasonably anticipated the sort of accident which happened. The weighing machine had been in the same situation for years without causing any accident to any one.] That was a question for the jury.—They referred also to *Barnes v. Ward* (a), and *Toomey v. The London, Brighton and South Coast Railway Company* (b).

1859.  
 CORNMAN  
 v.  
 EASTERN  
 COUNTIES  
 RAILWAY CO.

*Ballantine*, Serjt., and *Holland*, appeared in support of the rule, but were not called on.

MARTIN, B.—The rule must be absolute. We are all of opinion that there was no evidence of negligence to go to the jury. The railway Company had a station which they had used for a long time. They had placed on the platform a weighing machine for the purpose of weighing luggage carried by the trains. It was a large machine which any one might see. The defendant, on Christmas day of last year, went to the place where it was, and fell over it. There is an averment in the declaration that he was *lawfully* there, but the accident happened either from his being pressed upon by other people, or by his own misfortune. There is no evidence of any negligence on the part of the Company. No doubt if there had been an open place on the platform through which any one might have fallen without perceiving it, that would have been negligence on the part of the Company. Here however the platform was in the same

(a) 9 C. B. 392.

(b) 3 C. B., N. S. 146.

1859.  
CORNMAN  
v.  
EASTERN  
COUNTIES  
RAILWAY CO.

condition in which it had been for five years. The accident was one of those misfortunes which will occasionally occur, and of which people must bear the consequences. If the accident had occurred in a timber yard, or in any other place than in the station of a railway Company, no one would have thought of bringing an action.

BRAMWELL, B.—I have felt considerable doubt whether the rule should be made absolute, not from any want of inclination to take care that railway Companies are fairly treated, but because I think that all the ingredients to make out a case of negligence against the Company exist, except that proof is wanting that the mischief which happened was one which could have been foreseen. In such a case it is always a question whether the mischief could have been reasonably foreseen. Nothing is so easy as to be wise after the event. But here no witness stated that he would have known that the position of the weighing machine was likely to cause danger. I adopt the rule stated by *Williams, J.*, in *Toomey v. The Brighton Railway Company*—"It is not enough to say that there was some evidence; a scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the Judge in leaving the case to the jury; there must be evidence on which they might reasonably and properly conclude that there was negligence." Here the evidence was that the Company might reasonably have anticipated that no mischief could occur, since no mischief had resulted from keeping the machine in the position in which it stood for so long a period.

WATSON, B.—It is necessary for a railway Company to have a weighing machine. In the present case this ma-

chine was close up to the side of the railway, quite out of the course of the transit of passengers from the carriages to the outlet from the station. It may be that on this particular occasion, in consequence of the great number of passengers, the plaintiff was driven against the machine; if so, the cause of the accident was the pressure of the crowd. If there was a pitfall in the direct road, or close to the road, the cases cited might have applied.

1859.  
 CORNMAN  
 v.  
 EASTERN  
 COUNTIES  
 RAILWAY Co.

CHANNELL, B.—I agree that the rule must be made absolute. At the conclusion of the plaintiff's case my brother *Ballantine* objected that there was no evidence; I was of that opinion; but as it is often a most difficult question whether there is not a scintilla of evidence which ought to go to the jury, I refused to withdraw it from their consideration. Some of the cases put in the argument have no bearing on the question. If the accident had happened from the platform being so constructed as to be insufficient to carry the weight of the persons who might come in great numbers on a particular day, that no doubt would have been evidence of negligence on the part of the Company.

Rule absolute.



1859.

June 23.

RUSSELL v. THORNTON.

The plaintiff, who was the agent in London of some foreign owners of the steam-ship "B.," being instructed to cause the ship to be insured by a time policy for a year, from the 21st of January, 1857, employed H. and Co., insurance brokers, to effect the insurance.

On the 15th of January H. and Co. applied to the defendant to become an insurer.

On that day the plaintiff received a letter from the captain of the ship informing

him that the vessel had been aground and had received some very heavy blows, and had made her way in a sinking state to the port of Carthagena, where she then was. On the same day the plaintiff communicated this letter to H. and Co., but H. and Co. did not communicate it to the defendant. On the 16th the defendant agreed to become an insurer for 3000*l.*, and debited H. and Co. for the premium. On the 22nd the plaintiff, finding that no notice of the accident had reached London, sent an extract from the captain's letter to Lloyd's. The defendant, who was then for the first time informed of the fact that the ship had been on shore, wrote to H. and Co. as follows:—"Understanding that the ship 'B.' has been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired." This letter was not answered by H. and Co. The debit of H. and Co. in the books of the defendant remained till after the loss. The ship was surveyed and repaired and reported to be perfectly tight, and in a condition to undertake a voyage of any description on the 23rd of April. After several intermediate voyages she was totally lost on the 9th of October, 1857.

*Held*:—First, that the concealment of the information received from the captain, that the ship had been on shore, was a concealment of a material fact which vitiated the policy

Secondly.—That, assuming that the defendant's letter of the 22nd of January was an offer to insure on the terms therein mentioned, such offer was not shewn to have been accepted by H. and Co. or the plaintiff.

*Quære*, whether H. and Co. would have had any authority to accept such offer.

**DECLARATION.**—First count on a policy of insurance in the usual form, dated the 19th of January, 1857, whereby the plaintiff caused himself to be insured, "lost or not lost, at and from the 21st day of January, 1857, to the 20th day of January, 1858, both days inclusive, being for the space of twelve calendar months, in port, at sea, and at all ports and places whatsoever for any purposes whatever, with liberty to tow vessels, upon any kind of goods and merchandize; and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the 'Butjadingen,' &c.; the hull and materials valued at 7000*l.*; machinery at 4000*l.*," the assurers acknowledging themselves to be paid the consideration at and after the rate of eight guineas per cent., to return 1*l.* 8*d.* per cent. per month for each month she might be laid up or be in port, and 20*s.* per cent. for not going in to the Baltic, or if cancelled notice

to that effect to be given in writing.—(There was a running down clause, and a warranty that the ship should not sail to certain places named).—Averments: that the policy was underwritten by the defendant for 3000*l.*, and the plaintiff paid the premium; that Unimo Lubben, H. G. Fantzen and others were interested for the said period of twelve months and at the time of the loss after mentioned; that all things happened to entitle the plaintiff to the benefit of the assurance; and that during the continuance of the risk the ship, by the perils of the seas, was wholly lost. Breach: that the defendant hath not paid the said sum of 3000*l.*

Second count.—That the policy being so made and underwritten as aforesaid, and the said amount being so paid by the plaintiff to the defendant, a certain fact, to wit, the fact of the said vessel having been aground, and being in the port of Carthagen, requiring certain repairs, had not been communicated by the plaintiff or any person interested in the said policy to the defendant at the time of the making thereof, by reason whereof the validity of the said policy was questioned by the defendant, and thereupon it was agreed by and between the plaintiff, to wit, on behalf of the persons interested in the said vessel and the defendant, that the defendant should retain and keep the premium, and that the policy should become a valid and binding policy and contract of assurance, and that the risk undertaken by the defendant should commence so soon as the vessel was surveyed and the repairs required properly done, and should continue from thence until the completion of the said period in the policy mentioned; that afterwards and during the said period the vessel was surveyed and the repairs required well and properly done, and the vessel was then in a sound and seaworthy state, and thereupon from that time until the happening of the loss the policy became

1859.

RUSSELL  
v  
THORNTON.

1850.  
 ~~~~~  
 REWELL  
 v.  
 THORNTON.

and was a valid and binding agreement and contract of assurance to the amount of 3000*l*.; that the said persons in the first count mentioned were interested, &c.; that while the said policy and agreement were in full force the ship was wholly lost. Breach: nonpayment of the 3000*l*. Third count: for money had and received and on an account stated.

Pleas: First, to the first count.—That before the defendant became an assurer on the policy, the plaintiff and the persons interested in the policy, or some or one of them, had received a letter from the captain of the vessel informing him that the said vessel had been aground and sustained serious damage, and was then lying in Carthagena harbour needing repair, and had other information as to the then state of the vessel, which was material to the risk, and which was not known to the defendant, and the said letter and information might and could and ought to have been communicated to the defendant before he became an assurer, and the said letter and information were concealed from the defendant, and the defendant became an insurer and subscribed the said policy in ignorance that the plaintiff and the persons interested or some or one of them had received such letter.

Thirdly.—As to the residue of the claim: the defendant brought into Court 252*l*.

Fourthly.—As to the second count: that it was not agreed as alleged.

Fifthly.—To the second count: that the validity of the policy was not questioned as alleged.

Seventhly.—That a fact known to the assured and not known to the defendant was concealed from the defendant, and was not communicated to him, viz. that the plaintiff at the time of making the policy had knowledge of the fact that the ship had been aground and was in the port of

Carthagenæ requiring repairs, and had then, knowing it, concealed that fact from the defendant, the same being a material fact to be communicated to him.

1859.  
RUSSELL  
v.  
THORNTON.

Replication.—The plaintiff took issue on the first, fourth, fifth and seventh pleas, and took the 252*l.* out of Court.

Second replication to the first plea.—That after the making of the policy, and after the defendant knew of the concealment in that plea mentioned, the defendant, for certain good and sufficient considerations, agreed to waive, and did waive, all objection to the validity of the said policy by reason of such concealment. And the said policy became and was by virtue of such agreement and waiver, before and at the time of the happening of the loss, a good and valid contract of assurance, notwithstanding the concealment in the plea mentioned.

The plaintiff also demurred to the seventh plea.

The cause came on to be tried before *Willes, J.*, at the Surrey Summer Assizes, 1858, when a verdict was taken for the plaintiff for 3500*l.*, subject to the following special case :—

The plaintiff, a shipping agent, was the agent in London for certain persons residing at Brake, in the duchy of Oldenburg, owners of the iron screw steam-ship “*Butjadingen*,” built at Shields in 1855, and classed A. 1. at Lloyd’s. In January 1857 the said owners instructed the plaintiff to renew a then existing policy of insurance on the ship, which would expire on the 28th of January, 1857. The plaintiff desired Messrs. Hodges and Johnson, insurance brokers, to effect the insurance. Hodges and Johnson proceeded to effect the insurance, and on the afternoon of the 15th of January applied to the defendant’s agent to become an insurer, but he did not then agree to do so. On the 16th of January he agreed to take 3000*l.*, and the usual

1859.  
 ~~~~~  
 RUSSELL  
 v.  
 THORSTON.

slip was then signed by him; and on the 19th of January, 1857, the policy mentioned in the declaration was duly signed by the defendant. The defendant had not been in the risk before. He had no notice or knowledge that the ship had been on shore, or received injury either before or at the time of taking the risk or subscribing the policy. The steam-ship, on the 2nd of January, sailed from Gibraltar to Genoa, and on the same day got aground on the Spanish coast. On the 15th of January the plaintiff received from Mr. Wierichs, the master of the "Butjadingen," the following letter:—

"January 6, 1857.

"Mr. G. Russell.

"Carthagen Harbour, Spain.

"Sir,—I am sorry to inform you again that we have met with a very serious misfortune. Under way from Gibraltar our ship got aground on the 2nd instant, about 9 P.M., on the Spanish coast, at a place called Point St. Elena, about the south-western limit of the Bay of Almeira: she received some very heavy blows, and shaken to such a degree that caused the ship to spring a very serious leak, filled the aft part of the ship under the cabin level with the sea: all our pumps were only sufficient to keep her afloat; she had stuck fast aground for about twenty-two hours, when a sea came, and swung her round, thus moving her from her former position. The engines were immediately put at full speed, which enabled her to get free; and once more under way, and in a sinking state, we made the best way to the first port, viz. Carthagen, where we thought it safest and most likely for repairs; for to proceed further on the passage would have been at a great risk; the pumps might have become choked while under way, and then no doubt the ship would sink.

"During the time the ship was aground a great quantity

of cargo, &c., was thrown overboard to save the ship. We had very little hopes of saving her at the time the sea swung her round, &c.

1859.  
 RUSSELL  
 v.  
 THORNTON.

“Yours, &c., in haste,

“To Mr. G. Russell.”

“J. H. Wierichs.”

This letter was not shewn to the defendant.

The plaintiff on the same day sent a copy of this letter to the owners, accompanied by one from himself, in which he said: “In the absence of more detailed particulars, it is impossible to arrive at any conclusion as to the extent of damage she has received; but, as far as I can judge from Wierichs’ letter, the expense of repairs, &c., whatever they may be, will fall on the underwriters. I am afraid, however, that it will make her reinsurance very difficult, and the sooner I hear from you on this point the better.” The plaintiff communicated to Hodges and Johnson the fact of his having received the master’s letter, and left the same with them.

In January, 1857, there was a daily post from Carthagera to London. The average course of post was eight days.

The plaintiff, on the 22nd of January, forwarded to Lloyds the following paper:—

“Extract of a letter, dated Carthagera, January 6th, 1857, from Captain Wierichs, of the “Butjadingen,” to George Russell, the owner’s agent in London.

“That about 9 p. m. the 2nd instant, the above vessel got aground on Port St. Elena, on the Spanish coast (South Western promontory of the Bay of Almeira), filling the after part of the ship under the cabin level with the sea; but after the lapse of twenty-two hours she was again afloat, and in a sinking state made Carthagera. During the time the vessel was aground a great quantity of the cargo was thrown overboard to save the ship.”

1859.  
 ~~~~~  
 ROWELL  
 v.  
 THORNTON.

The particulars of this letter were inserted in a book called the "Casualty Book," kept at Lloyds, and in Lloyd's List.

On the 22nd the defendant's agent saw the notice in the Casualty Book, and communicated the same to the defendant. On the same day the defendant wrote to Hodges and Johnson a letter, of which the following is a copy.

"Old Swan Wharf, 22nd January, 1857.

"Messrs. Hodges and Johnson,

"Dear Sirs:—Understanding that the steamer 'Botjadingen' has been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired.

"Yours, &c.,

"T. Thornton."

This letter was received by Hodges and Johnson on the same day, and was not answered.

The defendant, on the 16th of January, 1857, debited Messrs. Hodges and Johnson on account with 240*l*., the amount of the premium, the balance of the account then being in favour of the defendant. This debit remained till April, 1858, when Hodges and Johnson handed to the defendant a check for the amount, in consequence of a letter from the defendant informing them that he was advised to pay the amount into Court.

The defendant was not, prior to effecting the insurance, aware that the plaintiff had received information of the accident, nor did he know the fact till after the commencement of this action. Until the 22nd of January, 1857, no information had been received at Lloyds of this accident.

The ship proceeded from Carthagena to Genoa, and then discharged her cargo. She could not be repaired at Genoa. She therefore proceeded to La Seyne, near Toulon in France, where she was surveyed and repaired. On the 4th of March, 1857, she was surveyed by M. Vidal, a surveyor appointed by the agent of Lloyds at Toulon. (The case

set out the surveyor's report, which stated that the repairs throughout had been done perfectly effectively, and that on the 26th of March the vessel was perfectly tight, and in a condition to undertake a voyage of any description. The report was dated the 2nd of April, 1857.)

After the survey the ship sailed from La Seyne, and arrived in London on the 26th of April, and after several intermediate voyages, was wholly lost by the perils of the sea on the 9th of October, 1857.

It was agreed that the Court might draw any inferences of fact which a jury might draw.

The question for the opinion of the Court is, whether, under the circumstances before mentioned, the plaintiff is entitled to recover under the first or second count of the declaration.

*Honyman* (with whom was *Maude*) argued for the plaintiff (June 22).—As to the first count, it lies upon the defendant to shew that the letter was material to be communicated to the defendant. At the time when the letter was written the vessel was safe in a port, where it may be presumed there was every opportunity of doing such repairs as might have been necessary to enable the ship to proceed in safety. [*Watson*, B.—It was clearly material to the risk that the vessel had been twenty-two hours on shore and her hull beaten about. The defendant ought to have had the option of determining whether, after that, he would undertake the risk. In Holland I believe that they never class a vessel after she has been on shore.]—As to the second count: the plaintiff having received the captain's letter sent it to Hodges and Johnson. They did not communicate it to the defendant. The plaintiff then finding that no intelligence had reached London from Carthagena, sent an extract from the captain's letter to Lloyds. The defendant,

1859.  
  
 RUSSELL  
 v.  
 THORNTON.

1859.  
 ~~~~~  
 RUSSELL  
 v.  
 THORNTON.

informed of this, wrote to Hodges and Johnson, "I do not consider that any risk commences until the vessel has been surveyed and repaired." The plaintiff expressed no dissent, and allowed the defendant to retain the premium. It was an offer to which silence gave consent. There was from that time a new contract that the defendant should keep the 240*l.*, and that the risk should commence from the time when the ship should be surveyed and repaired. [*Watson, B.*—It does not appear that the plaintiff, at any time before the loss, communicated to the defendant that the ship had been surveyed and repaired.] Suppose twelve months had elapsed and no casualty had happened, could it have been contended that the plaintiff might demand back the premium? [*Bramwell, B.*—Suppose there had been a loss before the vessel was repaired, the plaintiff might have said, "I never accepted the offer."] The retention of the letter is evidence of an agreement to waive the first policy. The plaintiff has been prevented from reinsuring the vessel elsewhere. There is evidence from which the Court may draw an inference, as a jury would, of an assent by the plaintiff to the defendant's proposal.

As to the demurrer. Assuming that the contract in the original policy was avoided by shewing that any material fact was concealed, the fact of the plaintiff's knowledge was not material to the risk the defendant incurred by entering into the agreement on the second count. It could not be material that the defendant should be informed by the plaintiff of that which he knew already from other sources.

*Bovill* (with whom was *C. E. Pollock*), for the defendant, did not argue in support of the seventh plea, and was not called upon to argue the other points.

*Cur. adv. vult.*

The following judgments were now pronounced.

1859.

RUSSELL  
v.  
THORNTON.

BRAMWELL, B.—We are all of opinion that the defendant is entitled to judgment. The first question is, whether the letter of the 6th of January, 1857, was a material one to be communicated to the defendant by the plaintiff. As to that, there really is no doubt about it. It is impossible to contend that a letter stating the fact of the vessel having been on shore for twenty-two hours, beaten about by the winds and the waves, and in such a condition as to be in a sinking state when she was got off, is immaterial; or that the fact was one upon which the underwriters had not a right to form an opinion in taking a risk upon a policy in which there was to warranty of seaworthiness. It would have been all-important, even if there had been a warranty of seaworthiness. The underwriters might well say, “You may patch her up, and make her seaworthy, but she will never be as good a ship as she was before she met with this calamity.” It was therefore obviously a letter that ought to have been communicated to the defendant.

The next question is, whether the plaintiff has made out a contract, as alleged in the second count. It seems to me that he has not. To this, as to all other contracts, there must be two contracting parties. Now what are the facts of the case? The original policy was void, and consequently the plaintiff (there being no fraud suggested) was entitled to receive back his premium. The defendant writes a letter, and says, “Understanding that the steamer had been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired.” That was an offer by him to be an insurer for the year; that is, to the end of the original year, for the premium which he had received, but conditionally on the vessel being surveyed and repaired, and the risk commencing from that

1859.  
RUSSELL  
v.  
THORNTON.

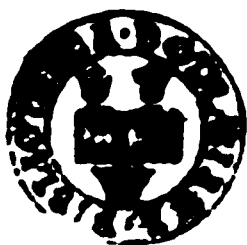
time only. Therefore it was a proposal for an entirely new contract. Now whether, if this had been accepted by the plaintiff, it would have constituted a good contract of insurance, it is not necessary to say. Assuming, however, that if it had been communicated to the plaintiff, and assented to by him, it would have been a good contract of insurance, it never was communicated to the plaintiff, but only to Messrs. Hodges and Johnson, the plaintiff's brokers, who effected the original insurance. I doubt whether they were competent to make this new contract on behalf of the plaintiff, because they could only do so upon the terms that the original policy of insurance should be considered as vacated. I doubt whether they had any authority from the plaintiff to agree that the first policy was void for the reason stated by the defendant, in his letter of the 22nd January, 1857. But assuming that letter to have been written to the plaintiff, and received by him when it was received by Hodges and Johnson, neither he nor they took any notice whatever of it; they give no answer to it of any sort; they do nothing, and they say nothing. Then how can it be said that the offer was accepted? Mr. *Honyman* says silence gives consent. In some cases it may; for instance, where there is a duty to speak, and the party does not, an assent may be inferred from his silence. But, in this case, when did the silence give the consent? At the end of a day, a week, or a month? Why at one of those times more than another? If not at the end of a month, why at the end of six months? It seems to me, therefore, that there has been no assent to the proposition contained in this letter of the 22nd of January. Suppose, before the vessel had been surveyed and repaired, she had met with some accident either on her voyage to Genoa, or on her subsequent voyage to the port where she was surveyed and repaired, what would there

have been to prevent the plaintiff from saying, "I never assented to the old policy being at an end, and I insist that it is still in force; you shall pay me for the loss." There is nothing to shew that the plaintiff would not have been at liberty to say, down to the last moment, "The policy is in force, and I insist on your obligations being fulfilled." It seems to me, therefore, that, treating the letter of the 22nd January as an offer by the defendant, it never was accepted by the plaintiff, and consequently there was no contract between the parties. Mr. *Honyman* said it is inconceivable that, if the vessel had sustained no damage at all, after the year was out the plaintiff might have gone to the defendant and insisted upon having the premium back. But I think the plaintiff would have been at liberty to do so. Therefore in my opinion the plaintiff is not entitled to recover on the second count. I entertain great doubt whether Hodges and Johnson ever intended to accept the offer; and, so far as it is a question of fact, I should have found the contrary. Looking at the ordinary way in which business is done, it is inconceivable that, if they intended that the offer should be accepted, they should not have communicated it to the plaintiff, their principal, and that they should not have written to the defendant. The inference I draw is, that, knowing that they ought to have communicated the captain's letter of the 6th of January to the defendant, they did not like to tell the plaintiff what had taken place, or to shew the defendant's letter to him. They did not like to write to the defendant and say, "We accept your offer," because they knew, if they did, they would leave the vessel uninsured until after she should have been surveyed and repaired. I think that they meant to trust to the chapter of accidents; that it would not be found out; and that after all, if it were, the defendant was wrong in saying this letter was material.

1859.  
RUSSELL  
v.  
THORNTON.

1859.

RUSSELL  
v.  
THORNTON.



Why did they not write to the defendant after the vessel was surveyed and repaired? They might have said, "The ship is surveyed and repaired; we can now accept your offer." As I said before, that would have been a sort of acknowledgment on their part that they had done something wrong; so they thought they had better say nothing about it. If this be a question of fact, I do not find that this offer was accepted, but the contrary. I cannot believe that if it had been the intention of Hodges and Johnson to accept it they would have acted as they did. Therefore, whether this is a question of law or of fact, or both, I hold that the plaintiff has not made out his second count.

Then, as to the demurrer to the seventh plea. If the plea amounts to anything it is a demurrer to the declaration, because it does not add a new fact at all; therefore it seems to me a bad plea. Therefore on the first two counts there will be judgment for the defendant, and for the plaintiff on the demurrer to the seventh plea.

WATSON, B.—As to the first count, there is no doubt that judgment must be given for the defendant on the ground of concealment. Now, in order to sustain a defence on that ground, it must be shewn that a material fact was concealed. I do not know what is material if the fact here concealed was not so, in a time policy where there is no warranty of seaworthiness. That disposes of the first count.

The second count is supposed to be supported by a letter written on the 22nd of January, the policy being dated on the 19th.—(His lordship read the letter.) Now is that an offer to the plaintiff that, on the plaintiff's abandoning the insurance quoad the time between the 19th of January and the time of the repairing of the vessel, the insurance should stand good from that time and

afterwards? I think not. I consider it is merely an expression of opinion that, inasmuch as the vessel was damaged, the policy would not attach until she was repaired. If that was his opinion, it is an erroneous one, because the policy was void ab initio, and never took effect at all. But take it most favourably for the plaintiff; it is an offer that he would agree to stand to the insurance after the vessel was repaired, though the original policy was void. That is a new contract. It is not a waiver of part of the contract, but it is substantially a new contract. "Whereas you were insured from the 20th of January, 1857, to the 20th January, 1858, and that policy is void: I will agree that there shall be a valid and subsisting contract from the day when the ship is repaired; that is, from the 2nd of April, 1857, to the 20th of January, 1858. In order to make a contract, two parties must concur. It is doubtful whether any assent by Hodges and Johnson would have been sufficient. They were agents to effect the policy, and when they had done so their duty was at an end, according to my view of the matter, and they had no power to alter a contract from the 20th January, 1857, to the 20th January, 1858, to one from April, 1857, to January, 1858, or to release the defendant from the 20th January to the time the ship was repaired. But suppose they had such authority, their duty would have been to communicate with the defendant:—"True it is, we admit that there was concealment; the policy is void, but you may keep the premiums, and we will agree to accept your offer that from the time of the repairs downwards you will be liable." They did not do this.

There are several circumstances which lead me to the conclusion that Hodges and Johnson (I infer this as a matter of fact) intended to hold the defendant to his liability on the original policy. The vessel was to undergo certain repairs. No notice was ever given by them to the

1859.

RUSSELL  
v.  
THORNTON.

1859.  
RUSSELL  
v.  
THORNTON.

defendant that she was about to be repaired, or was under repair, or that she was repaired; and surely, when a vessel had received the serious injury on the beach that this vessel had previous to the 6th of January, notice should have been given to the defendant in order that he might take part in inspecting and surveying her, and seeing whether she was properly repaired before he would hold himself liable under the terms of his letter. No notice was ever taken of the defendant's offer by the plaintiff or by any person until the loss had taken place in October.

What would be the effect of the defendant's letter as a waiver I cannot say, but I think it would not do. It was not argued, and I confess I am satisfied that the defendant must have judgment.

As to the seventh plea, I decline to give any opinion upon it, as I have not considered it. But I am quite sure that if it had been maintainable in the least degree, Mr. *Bovill* would not have given it up.

CHANNELL, B.—I am of opinion that the defendant is entitled to judgment. The first count is founded on a policy, dated the 19th of January, 1857, which is a time policy, covering a risk from the 20th January, 1857, to the 20th January, 1858. The question arises, whether or not the omission to communicate the information conveyed by the letter of the 6th January, 1857, avoids the policy; or, in other words, whether the information contained in the letter was material to be communicated to the defendant, so as to enable him to judge of the risk he was taking on himself. I agree with the rest of the Court, that it is impossible to look at the terms of the letter and avoid coming to the conclusion, that it was most material to be communicated to the defendant. The plaintiff himself, in communicating and sending a copy of it to his own agents,

Hodges and Johnson, thought the information most material. I acquit him of any charge of fraud. I rather remain under the belief that the plaintiff expected that his brokers would have communicated the letter to the defendant. On the first count, the defendant is entitled to our judgment.

The question as to the second count turns principally on the effect we are to give to the letter of the 22nd January, 1857, in connection with what preceded it and immediately followed it. If that letter is to be taken as an expression of the defendant's opinion, an opinion which may have been correct or incorrect, as to his liability on the policy of January, 1857, then the whole foundation of the defendant's liability on the second count entirely fails. If it gives the plaintiff a right at all, it must be on the supposition that it was intended to lead to a new contract. If so, it is simply a proposal, and we have to see whether or not that proposal was accepted. That may involve considerations of law or fact, or a mixed consideration of law and fact. I avoid giving any opinion upon the question whether or not, if Hodges and Johnson had distinctly assented to it, it would have been binding on the plaintiff. If the plaintiff was not bound by the contract, the defendant was not. I am rather inclined to the opinion that when they had once made a contract of insurance, valid on the face of it, liable to be defeated only by their fault in not having communicated something material to the risk, that then their authority was at an end, and they had no right to make a new contract for their principal. But supposing that they may have had authority, what did they do? They neither answered this letter, nor communicated it to the plaintiff. But it is said, inasmuch as the premiums had been credited (it is never pretended that they were paid) on the original policy, and those premi-

1859.

RUSSELL  
v.  
THORNTON.

1859.  
—  
RUSSELL  
v.  
THORNTON.

ums having been retained for a certain time—that is, the amount debited to Hodges and Johnson not having been struck out, there was evidence of an acceptance of the contract. But I look in vain for any evidence that the plaintiff, on the one hand, or Hodges and Johnson on the other, ever assented to the proposition that the premiums retained should be retained on the footing of that which is said to have been the new contract. In order to make a valid contract, there must be not only a proposition on the one hand, but an acceptance on the other; therefore if this is matter of law, the conclusion I come to is that no new contract was created by the letter of the 22nd of January. But if the question is one of fact, I decline to draw any such inference, because I can see some ground why Hodges and Johnson did not in terms accept this proposal, and why they did not communicate to their principal, the plaintiff, that such a letter had been received until after the defendant had declined to settle the loss, and the information could no longer be withheld. On these several grounds I am of opinion the judgment of the Court should be in favour of the defendant.

On the seventh plea to the last count I say nothing. I am not quite satisfied what is the true construction to be placed on the language of the plea; but I consider, either that it is withdrawn, or that Mr. *Bovill* assents to our giving judgment against him.

Judgment for the defendant on all the issues, except those on the second and sixth pleas; and for the plaintiff on the demurrer to the seventh plea.

1859.

JOHN HARRISON v. HYDE.

June 22.

**EJECTMENT** for land in the county of Northampton.

At the trial before *Erle, J.*, at the last Spring Assizes at Northampton, it appeared that the action was brought by the plaintiff, as heir at law of one James Harrison, to recover a piece of land containing 1 A. 2 R. 12 P., which formerly belonged to the said James Harrison. The defendant began, and proved that in the year 1800 James Harrison purchased from one Hartwell the land in question, which was an old inclosure, called Tip Brook Close, copyhold of the manor of Raund. It was bounded on the north by a stream called Tip Brook. The land along the brook was often called Tip Fields. In December of the same year a close, containing fourteen acres, was allotted to James Harrison by the award of the Commissioners, under an Act for enclosing Raund's Fields, in respect of other property. Shortly afterwards he divided this close into two parts, and converted about nine acres of it into an arable field called Scaley Close. The other portion, of rather more than four acres, he converted into sward. The extremity of the north-eastern angle of this latter piece adjoined the south-western angle of the old enclosure. At the point of contact he destroyed the fence, and made a communication between the piece so converted into sward and the old inclosure, by a short passage. From that time until his death he occupied them as one close of sward land, and spoke of the whole as Tip. He would say, "go down to Tip

H., in 1800, purchased a field called "Tip Brook Close," containing 1 A. 2 R. 12 P. and which was copyhold and an old inclosure. In the same year fourteen acres were allotted to him by the Commissioners under an inclosure Act. The testator divided the allotment. One piece, containing rather more than four acres, he converted into pasture, and made a communication between it and the old inclosure by a short passage, and from thence till his death he occupied and used the whole as one close of sward land, and called it "Tip." By his will, in 1825, he devised to his son James

"all that piece or parcel of sward land in Raund's Nether Field, called 'Tip Close,' containing six acres, more or less, *being part of an allotment awarded by the Commissioners to me at the time of the inclosure of Raund's Field:*"—*Held*, that there was evidence to go to the jury, that not only the allotted piece, but also the old inclosure, was intended to pass under the devise.

1859.  
  
 HARRISON  
 v.  
 HYDE

and do so and so;" others spoke of it, and knew it by the same description. In 1825, James Harrison made his will, and thereby devised "all that piece or parcel of land in Raund's Nether Field, called Scaley Close, containing nine acres more or less, being part of an allotment awarded to me by the Commissioners at the time of the enclosure of Raund's Field," to my son James Harrison. "And all that piece or parcel of sward land in Raund's Nether Field called Tip Close, containing six acres, more or less, being also part of an allotment awarded by the Commissioners to me at the time of the inclosure of Raund's Field," to my son William. By a codicil to his will, dated the 17th of October, 1837, the testator revoked the devise to William, and devised the last mentioned close, by the same description, to his wife Ann for life, with remainder to his younger son James. Ann Harrison was dead, and James Harrison the younger defended as landlord.

On these facts, the plaintiff's counsel submitted that there was no evidence that Tip Brook Close passed under the devise. The learned Judge directed a verdict for the defendant, reserving leave to the plaintiff to move to enter a verdict for him, if the Court should be of opinion that there was no evidence to go to the jury for the defendant.

*C. G. Merewether* having obtained a rule nisi accordingly,

*Field* shewed cause, in Trinity Term (May 31).—It is said the description of the land devised as being "part of the allotment awarded by the commissioners to me at the time of the enclosure of Raund's Field" is not that of the whole six acres, but only of four acres. But there is an adequate description, which with convenient certainty points to the whole inclosure. The devise is of "Tip Close"—it is shewn that the whole was known by that description;

It is described as "containing six acres," which is true of the whole. As soon as there is an adequate and sufficient definition with convenient certainty of what is intended to pass by the devise, any subsequent erroneous addition will not vitiate it: *Llewellyn v. The Earl of Jersey* (a). *Doe d. Hubbard v. Hubbard* (b) does not touch this question, because in that case if the description supposed to be erroneous had been struck out, there would have remained no description of the cottages intended to pass. In *Day v. Trig* (c) where one devised his freehold houses in Aldersgate Street to the plaintiff and his heirs, and, in fact, the testator had no freehold houses, but had leasehold houses there, it was held that the leasehold houses passed.

*Hayes*, Serjt., and *C. G. Merewether* were now heard in support of the rule. In *Day v. Trig* (c) the testator possessed nothing which answered the description of "freehold" houses. Here there was property which the language of the devise described truly. It is therefore not a case of false demonstration; and the words in question must have a meaning given to them as limiting the application of the earlier part of the description: *Morrell v. Fisher* (d). The closes merely adjoining each other at the angles, and being united by a passage, were of such a character that any one looking there would say that they were two closes. It is at least ambiguous whether the term Tip Close, taken by itself, would apply to one or both. There is therefore no such certain description of the whole as the term "Trogues Farm" constituted in *Goodtitle d. Radford v. Southern* (e). The case falls within the rule that if a certain description is given of the property intended to pass, which does apply

1859.

HARRISON

v.  
HYDE.

(a) 11 M. &amp; W. 183.

(b) 15 Q. B. 227.

(c) 1 F. Wms. 286.

(d) 4 Exch. 591.

(e) 1 M. &amp; Sel. 299.

1859.  
 HARRISON  
 v.  
 HYDE.

to part, but does not apply to another part, of the testator's property, that to which it does not apply does not ;  
*See d. Tyrrell v. Lyford. (a)*

MARTIN, B.—I am of opinion that the rule must be discharged. James Harrison, the testator, was in possession of a close containing 1 A. 2 R. 12 P. abutting on Brook. It was probably called Tip Brook Close, or Close. Very likely the next neighbour may have had Tip Close. Under an Act passed for inclosing Ram Field, the Commissioners allotted to the testator all fourteen acres. This allotment was divided. The testator put into one field a portion called Scaley Close, less than four acres, from which he made a communication into Tip Close, and continued to occupy the whole as a grass field. He made a will after this state of things had continued about twenty-five years; and in the first place he devised Scaley Close, which he described as containing about 1 acre, to his son James; then devising the property as he had occupied it. He then proceeds to give to another object of his bounty "all that piece of sward land in Ram Nether Field called Tip Close, containing six acres, more or less, being also part of an allotment awarded by Commissioners to me at the time of the inclosure of Ram Field." From the year 1800 the testator had occupied land as one close of sward, and called it Tip Close. I doubt he meant by the words "being part of an allotment," to include such part, not to confine the devise to the part of the close allotted to him. He probably meant to declare emphatically his intention to pass the whole.

BRANWELL, B.—If the testator had merely devised that parcel of sward land containing six acres more or less

(a) 4 M. & Sel. 530.

being part of an allotment in Raund's Field, I should have had a difficulty in saying that my brother *Hayes'* argument was not well founded, and should have doubted whether the devise was not satisfied by holding it to apply to the piece allotted. But the words "called Tip Close" shew that the testator was giving a close, and not part of a close. I think it is made out that there was a close called Tip Close. If there had been two closes the case might have been different. But on the evidence it appears that there was one close which included the piece of land in dispute, and contained six acres, more or less. The words "part of an allotment," &c., are a mere *falsa demonstratio*, and on that ground I think the rule must be discharged.

1859.  
  
 HARRISON  
 v.  
 HYDE

WATSON, B.—The testator, who was possessed of two closes, threw them together, and occupied them together as one close of sward ground. Having thus held and occupied the land for many years, he devised "all that piece or parcel of sward land," described as "containing six acres, more or less," which just coincides with the measurement of the whole. As to the words "being also part of an allotment awarded to me," I agree with my brother *Martin* that either means that the allotted part is to be taken as part of "Tip Close," or is a "*falsa demonstratio quæ non nocet*."

CHANNELL, B., concurred.

Rule discharged.



1859.

## IN THE EXCHEQUER CHAMBER.

June 22.

WITHERS v. PARKER.

The right of appeal given by the 34th section of the Common Law Procedure Act, 1854, applies to a *fi. fa.* issue under the Interpleader Act.

**T**HIS was an interpleader issue to try the right to certain goods claimed by the plaintiff under a bill of sale, and seized by the sheriff of Hampshire under a writ of *fi. fa.* issued on a judgment obtained by the defendant against one Frith. The issue was in the form prescribed by the 19th section of the 5 & 9 Vict. c. 109, and was tried before Martin, B., at the London sittings after last Hilary Term, when a verdict was found for the defendant, leave being reserved to the plaintiff to move to enter the verdict for him. In Easter Term the plaintiff obtained a rule nisi, which was argued in Trinity Term and the rule discharged. Thereupon the plaintiff entered an appeal under the 34th section of the Common Law Procedure Act, 1854.

*Buller* now moved to quash the appeal.—The application is made under the 15th section of the Common Law Procedure Act, 1854, and the question is whether the power of appeal given by the 34th section of the Common Law Procedure Act, 1854, applies to a *fi. fa.* issue under the Interpleader Act, 1 & 2 Wm. 4. c. 58. In *King v. Simmons* (1), which was decided before the Common Law

(1) Sect. 34.—“In all cases of trials at nisi and verdict at nisi and upon a point reserved at the trial, if the rule or show cause be refused, or granted and then the

charged, or made absolute, the party dissatisfied against may appeal.”

(1) 7 Q. B. 283.

Procedure Act passed, this Court held that a writ of error would not lie on a judgment entered on a feigned issue under the Interpleader Act. The general language of the 34th section of the Common Law Procedure Act, 1854, has not altered the law in that respect; and the reasons for the judgment in *King v. Simmonds* are still applicable. The Common Law Procedure Acts of 1852 and 1854 are in pari materia, and relate to proceedings *in actions*. By the interpretation clause of the Act of 1852 (sect. 227), the word "action" shall be understood to mean any personal action, brought by writ of summons in any of the superior Courts of law. That definition did not apply to replevin, and therefore, by the 99th section of the Act of 1854, it was extended to "any personal action in any of the said Courts." The 151st section of the Common Law Procedure Act, 1852, provides that execution shall not be stayed by proceeding in error unless bail be given; but though the language of that section is general, it has been held to be confined to cases where the plaintiff in error was defendant below: *James v. Cochrane* (a). Probably for that reason the 38th section of the Common Law Procedure Act, 1854, required bail "to pay costs where the appellant was plaintiff below." According to the true construction of the 34th section of the Common Law Procedure Act, 1854, it was not intended to apply to cases where error could not have been maintained.

*Collier* shewed cause in the first instance.—This Court entertained an appeal on an interpleader issue, their attention not having been called to this objection in *Williams v. Smith* (b). The provisions in the Common Law Procedure Acts, with relation to trials, apply to interpleader issues. By the 1 & 2 Wm. 4, c. 58, ss. 1, 6, a Judge has

(a) 9 Exch. 552.

(b) *Antè*, p. 559.


1859.  
 ~~~~~  
 WITHERS  
 v.  
 PARKER.

power to order that the parties shall proceed to the trial of a feigned issue, or with their consent he may determine the merits of their claims in a summary manner. Here a trial has been ordered; and the argument on the other side would go this extent, that though in this case some of the provisions of the Common Law Procedure Acts apply, yet others do not. The 18th section of the Common Law Procedure Act, 1854, which enables counsel, "upon the trial of any cause," to sum up the evidence, clearly applies to an interpleader issue. So also the 31st section, which provides that no new trial shall be granted by reason of the ruling of a Judge with respect to the stamp on any document. The 33rd section requires that the grounds shall be stated in every rule nisi for a new trial or to enter a verdict or nonsuit; and can it be contended that this provision does not apply to an interpleader issue? All these provisions as to trials being applicable, why should not the 34th section apply? The legislature has used the widest language, so as to include all cases of rules to enter a verdict upon a point reserved at the trial. There is no difference between interpleader issues and other actions as regards the terms upon which a new trial is granted when the verdict is against evidence: *Janes v. Whitbread* (a). The only effect of the appeal is to substitute this Court for the Court of Exchequer; and further proceedings are taken as if the judgment had been given by that Court: sect. 41. An appeal under the Common Law Procedure Act, 1854, is materially different from a proceeding in error. *King v. Simmonds* (b) was not decided on the 2nd section of the 1 & 2 Wm. 4, c. 58, but on the ground that in a feigned issue there is no process by summons, and the judgment is a mere interlocutory proceeding upon which the Court are subsequently to act in disposing of the rights of the parties.

(a) 11 C. B. 406.

(b) 7 Q. B. 289.

In *Snook v. Mattock* (a), which was a feigned issue, this Court quashed a writ of error brought on a special case; but Lord *Lyndhurst*, C. B., observed that the case of a special verdict, or a bill of exceptions upon a feigned issue, was very different. Now error would lie on a special case, under the 32nd section of the Common Law Procedure Act, 1854.

1859.  
  
 WITHERS  
 v.  
 PARKER.

*Bullar* argued in support of the rule.

WIGHTMAN, J.—We are all of opinion that this appeal will lie. *King v. Simmonds* and *Snook v. Mattock* were cases of writs of error; but the Court of error had no authority to entertain them, because there was no judgment upon which a writ of error could be brought. Under the Interpleader Act, the proceedings are uncertain until the final conclusion of the whole matter, and before it is terminated the Judge must award costs. In *Thorpe v. Plowden* (b), *Patteson*, J., said that *King v. Simmonds*, and *Snook v. Mattock*, “proceeded not so much on the ground that no writ was to be issued or action brought, as upon the plain intention of the legislature that no ordinary judgment of record should be entered up.” But the last Common Law Procedure Act has introduced another proceeding, viz. an appeal to the Court of Exchequer Chamber in the progress of a suit. The 34th section says, “In all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to shew cause be refused, or granted and then discharged or made absolute, the party decided against may appeal.” The 35th section contains a similar provision as to new trials. Therefore, long before the case is ultimately decided, a Court of error may entertain the question whether the verdict ought to be entered upon

(a) 5 A. & E. 239.


(b) 2 Exch. 387.

1859.  
~  
WITHERS  
v.  
PARKER.

the point reserved, or a new trial granted; and that is equally applicable to interpleader issues as to other suits. The Court of appeal simply gives such judgment as to entering the verdict or granting a new trial, as ought to have been given in the Court below. For these reasons I am of opinion that the case of an appeal is clearly distinguishable from that of a writ of error; and that it was intended by the legislature to give a right of appeal in all cases of rules within the 34th section.

ERLE, J.—I am also of opinion that this appeal lies. The Act is divided into chapters. The first section provides for the trial of any issue in fact by the Court or a Judge. From the 3rd to the 17th section is a chapter relating to compulsory arbitration. The sections from the 18th up to the 35th relate to the trial of causes. It seems to me that the legislature foresaw the objection now taken, and, intending to meet it, have used words which apply to other than personal actions. They say, “upon the trial of any cause,” that is upon any trial which can come legitimately before a Court of common law. The same language is found in the 19th section, which empowers the Court to adjourn a trial. Then there are enactments as to the substitution of an affirmation for an oath; as to witnesses, the stamp on documents, and a variety of other provisions, until we come to proceedings after the trial. Then a power of appeal is given, and there are enactments which regulate it until the rule is finally disposed of. I think that the legislature intended to give the same remedy in an interpleader as in any other suit. The language applies,—“upon the trial of any cause,”—an interpleader cause as well as any other cause. The mischief to be remedied is as great, for most important rights may be decided in an interpleader cause. The reason, therefore, for the enactment applying and the

words applying to an interpleader cause, I am of opinion that in such case an appeal lies. No doubt there are several sections which cannot be of universal application. The legislature has provided in a single enactment for a great variety of cases. Some of the provisions are applicable solely to plaintiffs and some to defendants; but I am clearly of opinion that this case is within the Act.

1859.  
  
 WITHERS  
 v.  
 PARKER.

WILLIAMS, J., CROMPTON, J., CROWDER, J., and BYLES, J.,  
 concurred.

Rule discharged.

---

IN THE EXCHEQUER CHAMBER.

(*Appeal from the Court of Exchequer.*)

---

HARRISON and Another v. TAYLOR.

June 22.

THIS was an appeal against the decision of the Court of Exchequer, in making absolute a rule to enter a verdict for the defendant, on the ground that the plaintiffs' alleged design was not a new and original design within the meaning of the 5 & 6 Vict. c. 100. The case stated on appeal (after setting out the pleadings (a)) was as follows:—

The plaintiffs were Manchester warehousemen, carrying on their business in partnership in London. The defendant

The plaintiffs registered, under the 5 & 6 Vict. c. 100, a design for ornamenting woven fabrics. The design was applied to a fabric woven in cells, called "The Honeycomb Pattern," and it consisted

of a combination of the large and small honeycomb, so as to form a large honeycomb stripe on a small honeycomb ground. The large honeycomb was not new and the small honeycomb was not new, but they had never been used in combination before the plaintiffs registered their design. Other fabrics had been woven with a similar combination of a large and small pattern. In an action against the defendant for infringing the plaintiffs' copyright:—*Held* (in the Exchequer Chamber, reversing the judgment of the Court of Exchequer), that the plaintiffs' design was a "new and original design" within the meaning of the 5 & 6 Vict. c. 100.

(a) See 3 H. & N. 301.

1859.  
HARRISON  
v.  
TAYLOR.

was a fancy woollen manufacturer in Yorkshire. The plaintiffs produced and proved at the trial a certificate of the registration of a design, with the said design thereto annexed, in accordance with the provisions of the 5 & 6 Vict. c. 100.


Cloths or woven fabrics, which were cellular in their character, and which had obtained the name of honeycomb cloths, being recently introduced in England, the plaintiffs, by weaving, made a honeycomb cloth, with cells upon a part of it larger and deeper than the cells on the rest of the cloth. The plaintiffs' witnesses described what was produced by the above combination of the large and small cells in the cloth, as a new and original design, but they said the only novelty consisted in putting the large and small size cells on the same piece.

Large cell honeycomb cloth similar to the large cell portion of the plaintiffs' cloth, and small cell honeycomb cloth similar to the small cell portion of the plaintiffs' cloth, had been made separately and apart from each other before the plaintiffs registered their alleged design; but the plaintiffs first produced a combination of a large cell honeycomb and a small cell honeycomb in one and the same woven fabric, and were the designers thereof, if (which the defendant denies) the facts disclosed in this case shew a design within the meaning of the statute.

Cloths composed of what were called large and small hopsacks, large and small checks, large and small diamonds, were made (by weaving) in England before and at the time when the plaintiffs registered their alleged design. The loom which makes the plaintiffs' cloth will also make the combined hopsack pattern with a change of arrangement.

A specimen of the large and small honeycomb in combination sold by the defendant is annexed and forms part of the case. (This pattern was the same as the plaintiffs').

At the trial the jury found that the plaintiffs' design was a new and original design, and a verdict was entered for the plaintiffs, leave being reserved to enter a verdict for the defendant if the Court should be of a contrary opinion.

1859.  
  
 HARRISON  
 v.  
 TAYLOR.

*Montague Smith* (*Brewer* with him), argued for the plaintiff (a).—The jury have found that this pattern is a “design,” and that it is new and original. [*Cockburn*, C. J.—This is not a question of “patent,” but of “design.” Suppose a manufacturer took small circles as the ground of his fabric, and made large circles as the border; that would not be an “invention;” but it would be a new design or drawing. The Court of Exchequer have looked at it as a question of invention, involved in the consideration of a patent.] This case is distinguishable from *Norton v. Nicholls* (b), where the plaintiff registered a shawl, which he alleged was new in respect of five points or designs, all of which had been before applied to shawls, though their combination was new. [*Erle*, J.—In that case no one could tell whether the plaintiff intended to register five shawls or one shawl.] Lord *Campbell*, C. J., in delivering judgment, said that the Court adhered to their decision in the case of *Regina v. Firmin* (c), “that a new and original combination, to be protected as a design, may be the result of simultaneously applying two old and known designs to the ornamenting of the button.” In *Norton v. Nicholls* the plaintiff registered the shawl; but a shawl is not a design. In this case the plaintiff has registered his design, in accordance with the provisions of the 5 & 6 Vict. c. 100, s. 15. Here is a design producing an effect different from any produced before. [*Cockburn*, C. J.—To the eye the two things are not the same. The


(a) Before <i>Cockburn</i> , C. J.,	<i>Byles</i> , J.
<i>Wightman</i> , J., <i>Erle</i> , J., <i>Williams</i> ,	(b) 28 L. J., Q. B. 225.
J., <i>Crompton</i> , J., <i>Crowder</i> , J., and	(c) Cited 3 H. & N. 304.

1859.  
  
 HARRISON  
 v.  
 TAYLOR.

judgment of the Court below proceeded on the ground that there was nothing new in what was produced. That test would apply if this had been a patent ; but in this case we are to see if there had been previously any like design,—whether a draughtsman would say that the combination of these two things was a new design.]

*Manisty* (*Blaine* with him), for the defendant.—The question is, what is the meaning of the word “design” in the 5 & 6 Vict. c. 100. To come within the protection of that Act, there must be a new and original design applicable to the ornamenting of some article of manufacture. The plaintiffs have taken two well known articles, viz., the large and small honeycomb, and have used them in a way well known. Each article is old, and the mode of dealing with them is old. The only novelty consists in doing that which has already been done with analogous fabrics, viz., putting the large and small size cells on the same piece. That is not a new and original design within the meaning of the Act. [*Cockburn*, C. J.—Has there ever been such a design before? Suppose a person substitutes squares for circles, would not that be a new design? There is no novelty in the invention: but there is novelty in the design.] In *Norton v. Nicholls*, Lord Campbell, C. J., said, “The statute does not mention any article of manufacture being a design, but considers the design to be protected as applicable to the ornamenting of any article of manufacture. The design is always considered different from the article manufactured, or the substance to which it is to be applied, and amongst these are shawls. The shawl is not a design, but an article of manufacture to which the design is to be applied.” If this copyright is valid, the effect will be to prevent any other person using the large and small honeycomb pattern in combination. The application of old

machinery in the old manner to an analogous subject will not support a patent: *Brook v. Aston* (a). The same principle applies to a design.

1859.  
  
 HARRISON  
 v.  
 TAYLOR.

*Montague Smith* was not called upon to reply.

COCKBURN, C. J.—We are all of opinion that the decision of the Court of Exchequer must be reversed. The question is one of fact, viz., whether this is a new and original design. The 5 & 6 Vict. c. 100 applies to matters adapted to the ornamentation of any article of manufacture; but the Court of Exchequer seem to have dealt with the subject upon the assumption that there was an analogy between copyright in a design and a patent for an invention. This is a question to be determined by the eye—is it a design in the sense of drawing? That is a question for the jury. It is true that in this case the design consists in using the honeycomb pattern alternately in small and large proportions, and I agree that it would not have been competent for the plaintiff to register this design as against a person having a copyright in the honeycomb pattern; but no person has a copyright, and as the matter is simply one in which the public at large are interested, there is nothing to prevent the plaintiffs from taking the original pattern and varying it to a certain extent, and registering the whole as a new design. That leads to the question, is it in its present shape, viz., the combination of large and small patterns, a new design? That is a matter of which anybody may satisfy himself by looking at it. There is a new combination, which is in substance a new design. The question of fact was left to the jury, and they were warranted in their finding. I do not see how fault can be found with it, since there was sufficient evidence to justify the verdict.


(a) 8 E. & B. 478.

1859.  
HARRISON  
v.  
TAYLOR.

WIGHTMAN, J.—I cannot help thinking that the Court of Exchequer, in their decision, proceeded upon a supposed analogy between the case of an invention for which a patent is obtained, and a *design* which comes under the protection of the Act for amending the laws relating to the copyright of designs for ornamenting articles of manufacture. The Act uses the words “any new and original design.” That is not a project or idea in the nature of an invention, but the representation of something, which a draughtsman has for the first time produced. If that be the true meaning of the word “design,” there is no doubt in this case that there was a design; for there was a drawing, and it was an original drawing. It is true that all its component parts had already been produced; but no one had produced such a pattern. It was said in the Court below, that this was “a mere combination in a manner well known;” so it is with a picture, all its parts may be old; but the combination forms a new design. It seems to me that it was properly left to the jury to say whether this was substantially a new and original design; and the jury have found that it was.

CROMPTON, J.—The case comes before us on an appeal against the decision of the Court of Exchequer in making absolute a rule to enter the verdict for the defendant, on the ground that this design was not a new and original design within the meaning of the 5 & 6 Vict. c. 100. By that, I understand that the question for our determination is, whether or no there was a case upon which a verdict ought to be entered for the defendant, looking at it as a matter of law or of fact. The Court below took upon themselves to say that the plaintiff was not entitled to the verdict. I cannot agree with them that this was such a clear question of law that it ought to have been withdrawn from the jury. A “design” means something in the nature

of a drawing, picture, or diagram, applicable to the ornamentation of some article of manufacture, such as pottery ware, linen or woollen fabrics, paper-hangings, carpets, &c. When we look at a picture or drawing we can say whether it is an original design or the same as one which has been already painted or drawn. So here, it is not a question of law, but of fact, whether the combination of things already known produced a new and original design. The plaintiff had a right to use any combination of the honeycomb pattern, for there was no copyright in it. As to the objection that this is a combination of two old things; that is always the case in pictures and drawings. It was left to the jury to say whether this was a new and original design; and I agree with the rest of the Court that there was sufficient evidence upon which they might act, and I cannot say that they have drawn a wrong conclusion.

1859.  
  
 HARRISON  
 v.  
 TAYLOR.

CROWDER, J.—I also think that this was a question for the jury; and that there was evidence upon which they might act. It is said that this being a combination of two well known things, is not a new and original design within the meaning of the 5 & 6 Vict. c. 100. I agree, that the Court of Exchequer appear to have decided this case upon a supposed analogy between the patent law and copyright in designs. But in this case the question is, whether there is a new and original design, and that can only be decided by looking at it. Seeing the effect produced by the combination, I cannot say that the jury have come to a wrong conclusion.

BYLES, J.—The learned Judge left the right question to the jury, and there was sufficient evidence to support their finding. The Court of Exchequer seem to have drawn a distinction between a new design and a variety of an old design. But the word “design” imports configuration. A

1859.

HARRISON  
v.  
TAYLOR.

WIGHTMAN, J.—I cannot see the parts of a pattern the size of the pattern is the same fabric, that combination and a new question for the jury, it has been of designs it is a question of law whether the Act uses constitutes a new design, I think it does. is no'

the JACOBURN, C. J.—My brothers *Erle* and *Williams*, who have left the Court, concur.

Judgment reversed.

## IN THE EXCHEQUER CHAMBER.

(*Appeal from the Court of Exchequer.*)

June 23.

BROWNE and Another v. HARE and Another.

The defend-  
ants, merchants  
at Bristol,  
through a

THIS was an appeal against the decision of the Court of Exchequer in discharging a rule to set aside the verdict broker contracted to buy of the plaintiffs, merchants at Rotterdam, ten tons of the best refined rape oil, to be shipped "free on board" at Rotterdam in September, 1857, at 48*l.* 15*s.* per ton, to be paid for on delivery to the defendants of the bills of lading, by bill of exchange to be accepted by the defendants payable three months after date, and to be dated on the day of shipment of the oil. On the 8th of September, the plaintiffs (having on the previous day advised that the shipment would be made) shipped on board a general ship, trading between Rotterdam and Bristol, five tons of the oil, and the master signed a bill of lading by which the oil was deliverable "unto shipper's order," and the plaintiffs indorsed it specially to the defendants. On the same day the plaintiffs inclosed in a letter to the broker the bill of lading, invoice and bill of exchange drawn on the defendants in accordance with the contract. On the night of the 9th the ship with the oil on board was run down in the Bristol Channel, and the oil totally lost. The plaintiffs' letter of the 8th arrived at Bristol on the afternoon of the 10th in due course of post, but after business hours. On the morning of the 11th the broker left with defendants the bill of lading, invoice, and bill of exchange for their acceptance. At that time he knew of the loss of the ship. In about two hours afterwards the defendants returned to the broker the documents left with them, on the ground that, under the circumstances, they were not liable to pay for the oil. In an action for not accepting the bill of exchange, and for goods sold and delivered, the jury stated that in their opinion, according to mercantile usage, the risk of the loss of the oil was on the defendants.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the property in the oil passed to the defendants when it was placed "free on board" in performance of the contract.

*Held* also, that it was a question for the jury whether the plaintiffs so shipped the oil in performance of their contract to place it "free on board," or for the purpose of retaining a control over it and continuing to be owners contrary to the contract.

found for the plaintiffs and enter it for the defendants, pursuant to leave reserved at the trial. The pleadings and material facts of the case are fully stated in the report of the case in the Court below. (3 H. & N. 484.)

1859.  
 BROWNE  
 v.  
 HARE.

*Raymond* argued for the appellants (the defendants) in last Easter Vacation (a) (May 17).—The decision of the Court of Exchequer is erroneous. In order to entitle the plaintiffs to succeed, they must satisfy the Court that the oil at the time it was lost was the property of the defendants; or that they delivered to the defendants the bills of lading duly indorsed, so as to have a right to call on them to accept the bill of exchange. It appears by the case that Goolden was the general agent of Browne and Co.; but it is assumed that he was also the agent of Hare and Co. for the purpose of receiving the shipping documents. First: no property in any specific oil passed by the contract, which would be performed by the delivery of any oil of the particular description mentioned in it. The shipment on board the “Sophie” did not transfer the property. The “Sophie” was a general ship; and if there had been simply a shipment of oil corresponding with the contract, that might have been a delivery to the vendees; but when the vendors shipped the oil, they took from the master bills of lading making it deliverable “unto shippers’ order or their assigns.” *Wait v. Baker* (b) is an express authority that under such circumstances no property passed. [*Crompton, J.*—In that case the vendor kept his hand upon the goods, by not indorsing the bill of lading to the vendee.] Lord *Stowell*, in his judgment in the case of *The Packet de Bilboa* (c), said:—“The ordinary state of commerce is, that goods ordered

(a) Before *Erle, J., Williams, J., Crowder, J., Crompton, J., Willes, J., and Hill, J.*

(b) 2 Exch. 1.

(c) 2 Rob. Adm. 133, 134.

1859.  
 {  
 BROWNE  
 v.  
 HARE.

and delivered to the master are considered as delivered to the consignee, whose agent the master is in this respect; but that general contract of the law may be varied by special agreement, or by a particular prevailing practice, which presupposes an agreement amongst such a description of merchants." There is no use in a bill of lading by which goods are deliverable "to shipper's order," except as shewing that he reserves to himself the property. [*Crompton, J.*—Is there any difference between a shipper taking a bill of lading in his own name and indorsing it over to the consignee, and putting in the consignee's name at first?] In the former case the property in the goods remains in the shipper; and the master undertakes to carry and deliver for him. When the consignee's name is on the bill of lading, it is a contract by the master to carry for and deliver to him. Here the shippers would have committed no breach of contract if they had assigned the bill of lading to any third person. The vendees had no power to compel a delivery of these specific goods. [*Willes, J.*—The vendors sent the bill of lading to Goolden, the common agent of both parties. The jury have found that there was an appropriation in fact, because they have found that according to mercantile usage, the risk of the loss of the oil was on the vendees.] It is submitted that Goolden was not the agent of Hare and Co. The documents were sent to him to deliver to them upon their acceptance of the bill of exchange. The judgment of the majority of the Court below proceeds on the assumption that the vendors intended to pass the property; but why should they have taken a bill of lading by which the cargo was deliverable to themselves unless they meant to retain a control over it? [*Crompton, J.*, referred to *Fragano v. Long (a)*.] There was nothing to prevent Goolden from altering the disposition of the goods, if they had

(a) 4 B. & C. 219.

arrived and the vendees had refused to accept the bill of exchange. But the oil was not in existence at the time Goolden left the bill of lading with Hare and Co., and therefore was incapable of being transferred: *Hastie v. Couturier* (a). It is incumbent on the consignees to shew an appropriation by consent of the parties, or some act which per se transferred the property. Whatever may have been the intention of the consignors they were at liberty to alter it: *The Aurora* (b), *The Josephine* (c). [Crompton, J.—The law is correctly stated by Lord Brougham in his judgment in *Cowas-Jee v. Thompson* (d), viz., “That when goods are sold in London, free on board, the cost of shipping them falls on the seller, but the buyer is considered as the shipper.”] Goolden would not have been liable if, with the authority of Browne and Co., he had refused to deliver the bill of lading to Hare and Co.: *Brind v. Hampshire* (e). [Willes, J., referred to *Williams v. Everett* (f).]

1859.

BROWNE

v.  
HARE.

*Prideaux* (Butt with him), for the plaintiffs (May 18).—Goolden was the broker acting for both parties. [Willes, J.—In cases where the broker gets a commission upon sales, one half from one party and the other half from the other, it is the common practice for all subsequent matters relating to the sale to be transacted through the broker. *Erle, J.*—If Goolden was the agent of both parties the appellant’s case is not arguable.] The fifth plea was not proved; it states that the “Sophie” was a general ship, not appointed or in any way denoted by the defendants. But the evidence is, that the defendants requested the plaintiffs to send part of the oil by the first vessel, and that the “Sophie” was the first vessel. The next allegation not

(a) 9 Exch. 102.

(d) 5 Moo. P. C. 165. 173.

(b) 4 Rob. Adm. 218.

(e) 1 M. &amp; W. 365.

(c) 4 Rob. Adm. 25

(f) 14 East, 582.

1859.

~  
BROWNE  
v.  
HARR.

proved is, that "before the indorsement of the bill of lading the ship was lost." The plea is either bad or a denial of the shipment under the contract. If it admits a shipment under the contract, it is bad. The effect of the shipment is to transfer not only the property, but the possession of the goods. But it would be sufficient to entitle the plaintiffs to recover if the property in the goods was transferred to the defendants. The effect of the contract is, that the defendants purchased the oil free on board, and the property passed on such shipment, though payment was not to be made until the delivery of the bills of lading. The words "free on board" mean that the oil was to be put on board at the expence of the consignors, and when on board to be at the risk of the consignees. In *Cowas-Jee v. Thompson* (a), goods contracted to be sold and delivered "free on board," to be paid for by cash or bills at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery; the purchasers elected to pay by bills, which they accepted. The sellers retained the mate's receipts for the goods, but the master signed a bill of lading in the purchasers' names. The purchasers became insolvent while the bill was running. It was held, that on the delivery of the goods on board the vessel, they were no longer in transitu, and therefore could not be stopped by the sellers. The case of *Turner v. The Trustees of the Liverpool Docks* (b) is distinguishable from the present case, because there the vendors retained the goods

(a) 5 Moo. P. C. 165. In *Couturier v. Hastie*, 5 H. L. 673, it was said:—"The goods are either shipped 'free on board' when they are thenceforward at the risk of the vendee, or they

are shipped 'to arrive' which saves the vendee from all risk till they are safely brought to port."

(b) 6 Exch. 543.

under their own control, by taking bills of lading making the goods deliverable to their own order, and indorsing them to their own agents. The distinction between the two classes of cases is pointed out by Mr. *Blackburn* (a) in commenting on the case of *Fragano v. Long* (b). [*Crompton, J.*—That case is a strong authority in favour of the plaintiffs.] Risk is a test of property. From the time of the shipment the goods were at the risk of the consignees. If the goods had been shipped without taking a bill of lading, it must be admitted that the property would have passed at the time of the shipment. Here the property passed at the moment when the goods were shipped in pursuance of the contract. There is evidence that the goods were so shipped, and the jury have found the fact. If the contract would have been completely fulfilled, so as to pass the property without the bill of lading, the taking of a bill of lading, and indorsing it to the defendants, which was done in furtherance of the contract, cannot alter the position of the parties. The sending of the bill of lading so indorsed to Goolden shewed the intent of the plaintiffs to perform their agreement. It is said that in *Wait v. Baker* (c) the words “free on board” were in the contract. But it was not shewn to have been the intention of the vendor to fulfil the contract. [*Williams, J.*—It is sufficient for your argument that the Court viewed it in that way.] Here the plaintiffs did all that they contracted to do. [*Crompton, J.*—In *Turner v. The Trustees of the Liverpool Docks* (d) the Court seem to affirm the proposition, that if a vendor says, “I will send goods so as to be delivered if the vendee pays for them,” it shews that he is shipping to himself. *Williams, J.*—The argument for the plaintiffs may be nar-

1859.

BROWNE

v.

HARE.

(a) *Blackburn on the Contract of Sale*, 128.

(b) 4 B. & C. 219.

(c) 2 Exch. 1.

(d) 6 Exch. 543.

1859.  
 BROWNE  
 v.  
 HARE.

rowed to this—that there is no difference whether the bill of lading makes the goods deliverable to the vendors' order, and they indorse it to the consignees, or whether it makes the goods deliverable to the consignees.] It is said that the plaintiffs might have struck out the indorsement, and *Brind v. Hampshire* (a) was relied upon. But by the shipment, in performance of the contract, the property passed, and it could not afterwards be divested by any act of the plaintiffs. In *The Packet de Bilbao* (b) the goods were sent at the risk of the shipper, and the property in them had not passed to the consignee. In *The Aurora* (c) and *The Josephine* (d) there was nothing to take the property out of the shippers; the shipments were not under contracts.

*Raymond*, in reply.—The mere fact of putting goods on board a ship amounts to nothing. In order to ascertain its effect, the contract and character of the shipment must be considered. At the time of this shipment three bills of lading (e) were taken, making the goods deliverable to the order of the vendors or their assigns. The taking of such bills did not shew an intention to ship the goods to the defendants in pursuance of the contract. If, after the indorsement of one bill of lading and before it was handed to the defendants, the plaintiffs had thought it convenient to alter the destination of the shipment, they could have done so. Down to the time of the delivery of the bill of lading the plaintiffs could have enforced a claim to the oil as against the defendants. [*Willes, J.*—Suppose I order of a person goods to be shipped “free on board,” and a bill of lading is sent by post, or by a messenger, and

(a) 1 M. & W. 365.

(b) 2 Rob. Adm. 133.

(c) 4 Rob. Adm. 218.

(d) 4 Rob. Adm. 25.

(e) This fact does not appear in the report of the case in the Court below.

before it reaches its destination the ship is lost. *Erle, J.* — There the bill of lading would be out of the legal control of the party, and the property would pass.] Here there was a contract for a bill of lading which the defendants were to have. The shipment did not pass the property, because the plaintiffs did an act which retained the property in themselves at the instant of the shipment. The expression “free on board” means only that the vendor shall pay all expenses till the property is shipped. It is said that the bill of lading may be disregarded; but if there had been none, and the plaintiffs had wished to retain the property in themselves, they would have said to the master, “You shall carry the goods for me.” That is in fact exactly what they have now done. Merely writing the defendant’s name on the bill of lading, without delivery, was no indorsement: *Marston v. Allen* (a). *Wait v. Baker* (b) shews that the defendants could not have maintained trover for the oil if the plaintiffs had chosen to indorse one of the bills of lading to some one else.

1859.  
BROWNE  
v.  
HARR.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

ERLE, J.—In this case we are of opinion that the judgment of the Court below should be affirmed.

The contract was for the purchase of unascertained goods, and the question has been, when the property passed. For the answer the contract must be resorted to; and under that we think the property passed when the goods were placed “free on board,” in performance of the contract.

In this class of cases the passing of the property may depend, according to the contract, either on mutual con-

(a) 8 M. & W. 494.

(b) 2 Exch. 1.

1859.

BROWNE

v.  
HARR.

sent of both parties, or on the act of the vendor communicated to the purchaser, or on the act of the vendor alone.

Here it passed by the act of the vendor alone. If the bill of lading had made the goods "to be delivered to the order of the consignee," the passing of the property would be clear. The bill of lading made them "to be delivered to the order of the consignor," and he indorsed it to the order of the consignee, and sent it to his agent for the consignee. Thus the real question has been on the intention with which the bill of lading was taken in this form: whether the consignor shipped the goods in performance of his contract to place them "free on board;" or for the purpose of retaining a control over them and continuing to be owner, contrary to the contract, as in the case of *Wait v. Baker* (a), and, as is explained in *Turner v. The Trustees of the Liverpool Docks* (b), and *Van Casteel v. Booker* (c). The question was one of fact, and must be taken to have been disposed of at the trial; the only question before the Court below or before us being, whether the mode of taking the bill of lading necessarily prevented the property from passing. In our opinion it did not, under the circumstances, and therefore the judgment must be affirmed.

Judgment affirmed.

(a) 2 Exch. 1.

(b) 6 Exch. 543.

(c) 2 Exch. 691.

---

1859.

## IN THE EXCHEQUER CHAMBER.

*(Error from the Court of Exchequer.)*GARTON and Another v. THE BRISTOL AND EXETER  
RAILWAY COMPANY.

June 22, 23.

THIS was a proceeding in error on the judgment of the Court of Exchequer for the plaintiff upon a special case stated by an arbitrator for the opinion of that Court (reported (*a*), *antè*, p. 33).

*Kinglake*, Serjt. (*Butt* and *Montague Smith* with him) argued for the defendants (*b*).—The first question is, under what act of parliament are the Company entitled to levy toll, whether under the original Act, 6 Wm. 4, c. xxxvi., or under the Act which authorized them to make the junction and branch railways, 8 & 9 Vict. c. clv. The 175th section of the 6 Wm. 4, c. xxxvi. regulates the tonnage rates to be taken by the Company for goods conveyed on their railway. The 176th section empowers the Company to demand cer-

By the 6 Wm. 4, c. xxxvi., a Company was incorporated for the purpose of making a railway from Bristol to Exeter. By section 178, the Company was authorized to make such reasonable charges for the conveyance of passengers and goods on their railway as they might determine upon, not exceeding a certain sum. The 8 & 9 Vict. c. clv., entitled "An

Act to amend the Acts relating to the Bristol and Exeter Railway, and to authorize the formation of a junction railway and several branch railways connected with the same," by section 19 provided that it should not be lawful for the Company to charge in respect of certain goods conveyed on the railway more than certain sums therein specified.—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the words *the railway* in the 19th section of the 8 & 9 Vict. c. clv. applied to the whole line, including the junction and branch railways, and not to the junction and branch railways only.

(*a*) The special case as there printed requires the following corrections:—At page 39, line 1, "*extra*" should be inserted between "no" and "risk:" at page 41, line 13, "*not*" should be

struck out.

(*b*) June 22 & 23. Before *Cockburn*, C. J., *Wightman*, J., *Erle*, J., *Williams*, J., *Crompton*, J., *Crowder*, J., and *Byles*, J.


1859.  
GARTON  
v.  
BRISTOL  
AND  
EXETER  
RAILWAY CO.

tain tolls in respect of passengers, beasts, cattle, and animals conveyed in carriages upon their railway. The 178th section authorizes the Company to use locomotive engines and in carriages propelled thereby, to convey upon the railway passengers, cattle, and other animals, goods, &c. and to make such reasonable charges as they may from time to time determine upon, not exceeding 3½d. a mile including the toll or rate thereinbefore granted. The Company have charged certain toll, as allowed by the 176th section and a small additional sum for locomotive power. Similar clauses were under discussion in the case of *Parker v. The Great Western Railway Company* (a). Section 187 provides that the rates and tolls shall be charged equally after the same rate per ton per mile throughout the whole of the railway in respect of the same description of articles. Also the 3 Vict. c. xlvii., s. 29, provides that the charge for the carriage of any passenger, goods, animals, &c., or the use of any steam-power, shall be charged equally to persons, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line only, and under the same circumstances. There is no other enactment with respect to tolls until the 8 & 9 Vict. c. clv., the provisions of which are inconsistent with the clauses in the former Act. By the 3rd section of the 8 & 9 Vict. c. clv., the Company are authorized to make a junction railway and three branch railways. The 18th section limits the charge for the conveyance of passengers. The 19th section enacts, "That shall not be lawful for the Company to charge, in respect of the several articles, matters, and things hereinafter mentioned, conveyed on the railway, any greater sum, includ-

(a) 11 C. B. 545.

the charges for the use of carriages, waggons or trucks, and for locomotive power, and all other charges incidental to such conveyance, &c., than the several sums hereinafter mentioned." That enactment applies only to the junction and branch lines. It would be strange if by the 8 & 9 Vict. c. clv., which was passed for the purpose of enabling the Company to construct a junction and branch railways, the legislature, without reference to the previous tolls and without any preamble, should have intended to interfere with the tolls over the whole line of railway. [*Crompton, J.*—The title of the 8 & 9 Vict. c. clv., is "An Act to *amend* the Acts relating to the Bristol and Exeter Railway, *and* to authorize the formation of a junction railway, and several branch railways connected with the same."] The sections from the 3rd to the 20th inclusive have reference to the junction and branch railways. The term "the railway" is first used in the 6th section; and in that and the 7th, 8th, 9th, 10th, 12th, 15th and 16th sections, it evidently means the junction and branch railways. Reading the 19th and 20th sections in connection with the previous sections, the same construction ought to be put upon them. Whenever the main line of railway is meant to be referred to, it is mentioned in express terms, as in the 46th, 48th and 49th sections. If the legislature had intended to alter the tolls on the main line, the 8 & 9 Vict. c. clv. would have contained provisions similar to the 28th and 29th sections of the 3 Vict. c. xlvii. The decision of the Court of Exchequer proceeded on the ground that there was an ambiguity in the language of the 8 & 9 Vict. c. clv., which the Company ought to have made clear.

The second question is, whether, when parcels are packed with various goods of a different description so as to cause any extra risk, the Company is entitled to make an additional charge in respect of that. Now the settled law as to

1859.  
  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY Co.


1859.  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY Co.

packed parcels is not disputed ; but it is submitted that in some cases the Company are warranted in making an additional charge, for instance, if a parcel is so packed as to create an extra risk. Here a cask of spirits was packed in the same parcel with goods which might have been damaged by it. The statute authorizes the Company to classify goods according to the risk of carriage.

*Collier*, for the plaintiffs.—The first question is, whether, by the 8 & 9 Vict. c. clv., s. 19, the Bristol and Exeter Railway Company are restricted to certain charges on the main line as well as on the junction and branches. It would be highly inconvenient that the Company should be restricted to certain charges for passengers and goods on the junction and branch lines ; but that their charges for conveyance on the main line should not be limited. No reason or ground of convenience for making such a distinction has been suggested ; and the presumption is that it was not contemplated by the legislature. By the 6 Wm. 4, c. xxxvi., ss. 175, 176, the Company are empowered to take certain limited tolls for goods and passengers carried on their railway by other persons using the railway with their own carriages. It was at that time supposed that such would be the mode in which the traffic on railways would be chiefly carried on. It is believed that these provisions have not been repealed, but are still in force as to tolls to be taken under such circumstances. But it was never intended that railway Companies should be at liberty to make arbitrary charges for the use of their line. The 1 & 2 Vict. c. xxvi., “for making several branches in the county of Somerset from the line of the Bristol and Exeter Railway, and for amending the Act relating to such railway,” by sect. 30 enacted, “that the rates or tolls, and charges to be made for the use of the said railway, or for the carriage of any pas-

sengers, &c., or for the use of any steam-power or carriage to be supplied, &c., should be charged equally *throughout the whole railway.*" [*Crompton, J.*—The expression "the said railway" seems to be used in the 3rd section of the 1 Vict. c. xxvi. as including the branches,—the words are "commencing at the main line of the said railway."] The 8 & 9 Vict. c. clv. is "An Act to amend the Acts relating to the Bristol and Exeter Railway," and not merely "to authorize the formation of a junction railway and several branch railways connected therewith." It recites all the previous Acts and must be taken as embodying the 6 Wm. 4, c. xxxvi. [*Crompton, J.*—The only clause that gives power to take tolls is the second, and that is done by making the whole one railway under one system. The 18th and 19th sections merely limits the power.]—He was then stopped by the Court.

*Kinglake, Serjt.*, in reply.—By the interpretation clause of the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, s. 3, which Act is incorporated with the 8 & 9 Vict. c. clv., it is enacted that "the railway" shall mean the railway and works by the special Act authorized to be constructed. [*Crompton, J.*—There are many clauses which refer to "the junction railway," and "branch railways" authorized to be made. *Wightman, J.*—The 8 & 9 Vict. c. clv., s. 20, empowers every first class passenger travelling upon the railway to take with him his ordinary luggage not exceeding 100 lbs. in weight. The quantity allowed by the 6 Wm. 4, c. xxxvi., s. 180, was only 40 lbs. It would be highly inconvenient to construe the words "the railway," in the 20th section, as applying only to the junction and branch railways. In the 46th section the term "the railway" is used, applying to part of the main line. The 48th

1859.  
  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY Co.

1859.  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY CO.

section legislates with respect to “the said railway, junction railway and branch railways.”]

COCKBURN, C. J.—We are all of opinion that the judgment of the Court of Exchequer must be affirmed. We have to determine whether the 18th and 19th sections of 8 & 9 Vict. c. clv., which is “An Act to amend the Acts relating to the Bristol and Exeter Railway, and to authorize the formation of a junction railway and several branch railways connected with the same,” are applicable generally to the whole railway, including the junction and branch railways, or solely to such junction and branch railways. There is a series of sections leading up to the 18th in which “the railway” is spoken of in the singular number; and it is said to refer only to the particular part of the proposed new junction and branch railways. The defendants would put a similar limited construction on the 18th and 19th sections. But such a construction would lead to such absurd consequences that we cannot safely adopt it. The defendants must say that the provisions of the Act apply to the junction and branch railways. We should then have to construe the term “the railway” as applying to three or four railways. But we think that the language used shews that the legislature contemplated that the junction and branches would form one undertaking with the original railway, and accordingly, after passing from special provisions applicable to the junction railway or one or other of the branch railways, they speak of the whole of the Bristol and Exeter Railway, with the branches, as one railway. That view of the case is fortified when we look to what had been the previous legislation on the same subject. The 1 Vict. c. xxvi. is “An Act for making several branches in the county of Somerset from the line of the Bristol and Exeter Railway,

and for amending the Act relating to such railway." In the earlier sections of that Act, where it relates to making the branches, the Act applies to the branch railways and gives the necessary power for their construction. Then comes a general provision in respect of tolls for the use of the "said railway" (sect. 30), which is there clearly shewn by the context to apply to the general body of the Bristol and Exeter Railway. The language of the 8 & 9 Vict. c. clv. is similar, the provisions are analogous, and the titles of the two Acts are nearly the same. The Acts are not only in *pari materiâ*, but were passed for similar purposes. And the former Acts afford us a means of construing that now in question. On this ground the judgment of the Court below must be affirmed. It is not necessary to go into the other question which was discussed, but at the same time looking at the grounds of the decision in the Court below, I think it was correct.

WIGHTMAN, J.—I agree with the Lord Chief Justice that the word "the railway," in the 19th section of the 8 & 9 Vict. c. clv., means not only the junction and branch railways, but the whole system of lines of which the Bristol and Exeter Railway consists,—the whole in fact of that which is referred to in the title of the Act. There are various reasons for this, and any other construction would lead to inconvenient and absurd consequences. By the 20th section of the 8 & 9 Vict. c. clv., passengers on "the railway" are empowered to take 100 lbs. weight of luggage, whereas under the 6 Wm. 4, c. xxxvi. they could only take 40 lbs. It can hardly be contended that a passenger starting by the branch line with 100 lbs. of luggage must either leave behind him or pay for 60 lbs. of it when he comes to the main line. By the 6 Wm. 4, c. xxxvi., s. 177, the Com-

1859.  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY Co.

1859.  
 GARTYNS  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY CO.

pany were empowered to make such charges as they should think proper for providing locomotive power, in addition to the fixed tolls which they were enabled to take by the 175th section. The 8 & 9 Vict. c. clv., s. 119, takes away that power and fixes sums to be taken somewhat larger than those in 6 Wm. 4, c. xxxvi., s. 175. It may well be, that the legislature intended to fix a maximum charge for the whole line. It would be difficult to apply the limited construction of the expression "the railway," contended for by the defendants, to the clauses preceding the 18th, because in one set of sections, relating to one branch, provision is made for carrying "the railway" over the river Parrett: in the 10th section, relating to another branch, for carrying it under the Grand Western Canal. Therefore the term "the railway" does not there apply to the junction and branch railways. It seems therefore in these sections to relate to the general system of railways as forming a whole. This view is confirmed by reference to the 1 Vict. c. xvi., and 3 Vict. c. xlvii. In the former of these Acts, the title of which is similar to that of the 8 & 9 Vict. c. clv., the term "the railway" is used in the singular; and in the 30th section of that Act and the 25th section of the 3 Vict. c. xlvii. it is clear that the whole railway is referred to by that expression. I think, therefore, that the construction adopted by the Court of Exchequer is correct.

CHAMBERLAIN, J.—I concur in thinking that the legislature has made the whole undertaking one railroad. The question is, whether the term "the railway" in the 18th and 19th sections refers to the general line. The title shews that the Act is not an Act merely to enable the Company to make a junction and branches but to amend the Acts relating to the railway. Therefore the construction contended for by the

plaintiffs is within the title of the Act. The 2nd section enables the Company to take tolls on the branches as parts of the general railroad. If not, there is no clause enabling them to take toll. When the schedule relating to the subscription for new shares is looked at, it appears that the legislature have designated the whole line with the branches and junction as the Bristol and Exeter Railway. I think the effect is to make it one railway. It was argued that in the earlier sections the term "the railway" is used in a different sense. But I do not accede to that argument. To make out their case, the defendants must say that in the 19th section the expression means three branch railways and the junction railway. But the term "the railway" is not used in the earlier sections in the sense the defendants seek to put upon it in the 18th and 19th sections. Whenever the legislature were dealing with the three branch railways and the junction railway, as in the 4th, the 17th and in the 23rd sections, it is so expressed. The inconveniences, pointed out by my brother *Wightman*, which would result if the construction contended for by the defendants was to prevail, are extremely great. I see nothing unreasonable in the construction contended for by the plaintiffs; on the contrary, I think it very unlikely that the Company would have been left free to charge as they might please.

1859.  
  
 GARTON  
 v.  
 BRISTOL  
 AND  
 EXETER  
 RAILWAY Co.

CROWDER, J., concurred.

BYLES, J.—I agree that the judgment of the Court of Exchequer must be affirmed. The case was argued as if the main object of the Act was to enable the Company to make a junction and branches. But the title may be looked at, and it describes the Act as "An Act to amend the Acts relating to the Bristol and Exeter Railway." The pre-

1859.  
GARTON  
v.  
BRISTOL  
AND  
EXETER  
RAILWAY Co.

amble recites that "it is expedient that some of the powers and provisions of the said Acts should be amended and enlarged." That evidently shews that the main object of the legislature was to amend and enlarge the powers and provisions of the Acts relating to the Bristol and Exeter Railway. The first section incorporates the Lands Clauses Act, 1845, and part of the Railway Clauses Act, 1845, with the general system of Acts relating to the Bristol and Exeter Railway. The whole are incorporated together and are to form part of the Act. The Act therefore is an Act relating to the general regulation of the Bristol and Exeter Railway. The Lord Chief Justice and my brother *Crompton* have referred to the 2nd section as shewing that this Act relates to the whole undertaking. If the 18th, 19th and 20th sections had immediately followed the 2nd section no one could have doubted but that the term "the railway" in those sections referred to the whole railway. But they are more properly inserted after the 17th section, because, coming after the series of sections which empower the Company to make these additions to their undertaking, it is more clear than it otherwise might have been that the provisions are intended to extend to the junction and branch railways.

Judgment affirmed.

---

1859.  


## MEMORANDA.

In Trinity Term Lord *Chelmsford* resigned the Great Seal, and it was delivered to Lord *Campbell*, Lord Chief Justice of the Court of Queen's Bench.

*John Hinde Palmer*, of Lincoln's Inn, Esquire; *Archibald John Stephens*, of Gray's Inn, Esquire; and *William David Lewis*, of Lincoln's Inn, Esquire, were appointed Her Majesty's Counsel.

In Trinity Vacation The Right Honourable Sir *Alexander Edmund Cockburn*, Bart., Lord Chief Justice of the Court of Common Pleas, was appointed Lord Chief Justice of the Court of Queen's Bench. The Honourable Sir *William Erle*, Knight, one of the Judges of the Court of Queen's Bench, was appointed Lord Chief Justice of the Court of Common Pleas. *Colin Blackburn*, of the Inner Temple, Esquire, was appointed a Judge of the Court of Queen's Bench, and gave rings with the motto "*Promere Jura.*" He afterwards received the honour of knighthood.

Sir *Fitzroy Kelly* and Sir *Hugh McCalmont Cairns*, having resigned their offices of Attorney and Solicitor General, were succeeded by Sir *Richard Bethell*, Knight, and Sir *Henry Singer Keating*, Knight.



AN  
INDEX  
TO THE  
PRINCIPAL MATTERS.

---

ABATEMENT.

*Time for commencing Action after.*

See LIMITATION OF ACTIONS.

ACTION (ON THE CASE) FOR  
DECEIT.

(1). *Damages—Naturally resulting from.*

A declaration alleged that the plaintiff, defendant and C. had entered into a joint speculation in railway shares: that C. had advanced 6000*l.*; 2000*l.* on his own behalf, 2000*l.* as a loan to the plaintiff, and 2000*l.* on behalf of the defendant: that C. was desirous of retiring from the adventure, and the defendant offered to take upon himself the whole of the adventure and debt of 6000*l.*, provided the plaintiff would consent to abandon his share to the defendant, and C. would accept the defendant as his debtor in the place of the plaintiff for the said sum of 2000*l.*; that the plaintiff did aban-

don his share of the adventure to the defendant, and the defendant agreed to take upon himself the whole adventure and become debtor to C. for the whole 6000*l.*, and C., on the faith and in the belief that such an arrangement was made, consented to accept the defendant as such debtor in the place of the plaintiff. Nevertheless, the defendant knowing that he alone was capable of proving that the plaintiff had assented to the said arrangement, fraudulently, falsely, and maliciously, and before the Evidence Act, 14 & 15 Vict. c. 99, and in order to induce C. to believe that the said joint adventure had never been put an end to, and to induce C. to sue the plaintiff for the 2000*l.*, and to deter the plaintiff from calling the defendant as a witness, and to destroy his credit as a witness, if so called, wrote and sent to C. a letter, purporting to be addressed to the plaintiff but directed to C., wherein he fraudulently and falsely pretended to expostulate with the

plaintiff, and asserted that the plaintiff had positively refused to concur in the said arrangement. By means whereof C. was induced to and did believe that the plaintiff had never agreed to retire from the said adventure, and, acting on such behalf, C. brought an action against the plaintiff to recover the 2000*l.*: that the said action was referred to an arbitrator, upon the terms that neither the plaintiff nor the defendant should be examined; and C. recovered against the plaintiff 2,486*l.*, which he was compelled to pay.—*Held*, that the declaration disclosed no cause of action, since it did not appear that the damage to the plaintiff was a natural result of the wrongful act of the defendant. *Collins v. Cave*, 225

(2). *Against Director of Company for procuring false Representation to be made as to value of Shares.*

By the rules of the Stock Exchange Act for 1853, the committee will not fix a settling day for the shares in a mining Company, or permit the same to be inserted in the official list, unless it has been represented to them that the subscription list is full, with the exception of such shares as are reserved for special purposes, and that not less than two-thirds of the scrip have been paid upon. The defendant, one of the directors of a mining Company, formed to consist of 100,000 shares of 1*l.* each fully paid up, having in conjunction with others falsely and fraudulently caused it to be represented to the committee of the Stock Exchange that 41,711 shares had been allotted, and that 40,911*l.* was in the hands of the Company's bankers, having been paid upon the scrip, 40,000 shares being reserved as the price to be paid for certain land, and 19,000 for

distribution in the colony, the committee caused a settling day to be appointed and the shares to be quoted in the official list. The plaintiff knowing the rule of the Stock Exchange and, from seeing the shares quoted, believing that two-thirds of the scrip had been paid upon, bought on the Stock Exchange from third persons 200 shares in that belief. It was proved that no more than 19,183 shares were allotted and only 7000 were ever paid upon, and that the defendant knew this at the time of the representation to the Stock Exchange. The shares turned out to be valueless.—*Held*, that an action was maintainable by the plaintiff against the defendant for the false and fraudulent representation made by him. *Bedford v. Bagshaw*, 538

ACTION (ON THE CASE) FOR NEGLIGENCE.

See HIGHWAY.

RAILWAY AND CANAL TRAFFIC ACT.

(1). *Evidence.*

(a). B. took a ticket from Workington to Carlisle from the Whitehaven Junction Railway Company. In order to arrive at the platform at the station at Maryport the trains pass over the line of the Maryport and Carlisle Railway. On that line is a self-acting switch used for shunting carriages into a siding. The switch and siding were the property of the Maryport and Carlisle Railway Company, but used exclusively by the Whitehaven Junction Railway Company. The switch is about four yards from a gate which is on the line of the Whitehaven Junction Railway Company, a servant of which Company was in the habit of occasionally looking over the gate to see that the switch was in proper order. It was proved that all

switches are liable to get out of order. A train of the Whitehaven Junction Railway coming slowly up to the station, in consequence of the points being turned the wrong way, ran into the siding and came in collision with some coal trucks, whereby B. was killed. The Judge left it to the jury to say whether there was negligence on the part of the Whitehaven Junction Railway Company. The jury found that there was.—*Held*, that the question was properly left to the jury; that there was evidence of such negligence, and that, upon such finding, the Whitehaven Junction Railway Company was liable, under the 9 & 10 Vict. c. 93, to an action by the personal representative of B. *Jane Birkett, Executrix of John Birkett, deceased, v. The Whitehaven Junction Railway Company,* 780

(b). The defendants, a railway Company, had on their platform, standing against a pillar which passengers passed in going to and coming from the trains, a portable weighing machine, which was used for weighing passengers' luggage, and the foot of which projected about six inches above the level of the platform. It was unfenced and had stood in the same position, without any accident having occurred to persons passing it, for about five years. The plaintiff being at the station on Christmas day inquiring for a parcel, was driven by the crowd against the machine, caught his foot in it and fell over it.—*Held*, that there was no evidence of negligence to go to the jury on the part of the Company, the machine being in a situation in which it might have been seen, and the accident not being shewn to be one which could have been reasonably anticipated. *Cornman v. The Eastern Counties Railway Company,* 781

## ACTION (ON THE CASE) AGAINST SHERIFF.

*By Owner for selling Goods let to execution Debtor—Pleading—Damages.*

First count: that plaintiff was the owner of goods which had been let to hire to one T. for a term, and that the defendant sold the goods and dispersed them so as to prevent the same being followed or found, whereby plaintiff was injured in her reversionary estate.

Second count: similar to the first, except that it alleged that the goods were let to T. "to be used in a certain house and not otherwise or elsewhere: that T. had the use of the goods, subject to the expiration of the term and subject to the determination of the term, by the violation of the terms thereof."

Pleas: that the defendant seized and took and sold the goods, not in market overt, but as sheriff under a writ of *fi. fa.* against T., and that the plaintiff had not sustained and would not sustain any damage by reason of the premises.—*Held*, that as the damages sustained by the plaintiff were the foundation of the action, the pleas were an answer to the action. *Dame Harriet Lucy Tancored v. Allgood,* 488

## ADMINISTRATION BOND.

*See BOND.*

## AGREEMENT.

*Assignment of Debt—Consideration.*

The defendant being indebted to C. in a sum of 113*l.* 13*s.*, and C. being indebted to the plaintiff on two bills of exchange for 60*l.* and 53*l.* 13*s.*, one of which was dis-

honoured and the other about to become due, the plaintiff requiring some security proposed to C. that the defendant should guarantee the payment of the bills, when C. signed the following document:—"I hereby agree to authorize B. (the defendant) to pay L. (the plaintiff) or his order the sum of 113*l.* 13*s.*, the amount of two acceptances, towards my account for building the cottages at W. B. to debit my account with the above money: also L.'s receipt to B. I acknowledge shall be binding between myself and B. in the contract." At the foot of this document the defendant wrote "acknowledged," with his signature.—*Held*, that the plaintiff could maintain no action against the defendant to recover the money, since the document was merely an assignment of a chose in action, and there was no consideration for a promise to pay, inasmuch as the debt due from C. to the plaintiff was not extinguished. *Liversidge v. Broadbent*, 603

## AMENDMENT.

*Of Pleading.*

A declaration alleged that the defendant, by falsely representing that he was paying 70*l.* a month for stock consumed, and was taking 100*l.* a month as receipts from his business as a publican, induced the plaintiff to purchase the business. At the trial it appeared that the payments and receipts were as alleged, but the business was chiefly out door business, and that the representation was that it was done over the counter. The Judge amended the declaration by inserting the words, "and that the business was a bar business carried on at home and chiefly over the counter, and not a business done elsewhere or out of the house."—*Held*, that the Judge had power to

## APPRENTICE.

make the amendment under the 222nd section of the Common Law Procedure Act, 1852. *Roles v. Davis*, 484

## APPEAL.

(1). *In Interpleader.*

See COMMON LAW PROCEDURE ACT, 1854, SECT. 34.

(2). *From County Court.*

See COUNTY COURT, (2).

(1). *Conviction by Justices*, 20 & 21 Vict. c. 43.

(1). An appeal lies under the 20 & 21 Vict. c. 43, when the justices have dismissed the information or complaint. *Davys, App., Douglas, Resp.*, 180

*Practice.*

(2). On appeal under the 20 & 21 Vict. c. 43, the respondent is entitled to begin. *The Blackpool Local Board of Health v. Bennett*, 127

## APPRENTICE.

*Indenture of Apprenticeship—Covenants in—What are Independent.*

To an action on an indenture of apprenticeship for a breach of covenant by the master in not instructing the apprentice and providing him with food and lodging, the defendant pleaded that the apprentice conducted himself in so dishonest a manner in the defendant's business, and defrauded and robbed the defendant, so that it became unsafe for the defendant to continue him in his service, whereupon the defendant dismissed him.—*Held*, on demurrer, that the covenants in the indenture were independent covenants, and consequently the plea was bad. *Phillips and Others v. Olift*, 168

## ARBITRATION.

*Proviso for Reference of Disputes to  
— When Pleadable in bar of  
Action.*

To an action for a breach of covenant contained in an indenture of lease, the defendant pleaded that it was agreed by and between the parties to the indenture, that if any difference, variance, controversy, doubt, or question should arise between the parties, touching or concerning any covenant, clause, proviso, matter or thing in the said indenture contained, then all and every such matter in difference should be discussed, resolved and finally ended by arbitrators chosen as therein provided: that the parties to the said indenture should not prosecute any suit, or seek any remedy either in law or equity for relief in the premises without first submitting to such arbitration and reference.—*Averments*: that the plaintiff's claim, and the defendant's defence thereto, was a matter in difference which arose touching and concerning the covenants in the said indenture, and that the defendant was ready and willing to submit the same to arbitration, and had done all things necessary to entitle him to have the same submitted:—*Held*, that the plea was bad, since the covenant was an absolute agreement to oust the superior Courts of their jurisdiction, and therefore void. *Horton v. William Sayer, Executor of the last Will and Testament of Edward Sayer*, 643

## ARREST.

*For Debt under 20l.*

After judgment had been recovered for a debt exceeding 20l., the defendant paid certain instalments to the plaintiff, which reduced the amount due under the judgment to 18l. 18s.—*Held*, that, notwithstanding

ing the 7 & 8 Vict. c. 96, s. 57, the defendant might be taken in execution to satisfy such sum. *Holbert v. Starkey*, 125

*See* TRESPASS, (2).

## ASSAULT AND BATTERY.

*See* TRESPASS, (1).

## ATTORNEY.

*See* INFANT.

(1). *How far bound by Statement of Facts in an Order consented to by his London Agent.*

*See* SHERIFF, (1).

(2). *Delivery of Bill to Promoter of Joint Stock Company.*

In an action on an attorney's bill against three defendants, who were promoters of a Joint Stock Company, it appeared that the plaintiff sent to one of them in a letter a bill headed "To the promoters of the L. Company."—*Held* a sufficient delivery of the bill within the 6 & 7 Vict. c. 73, s. 37. *Mant v. Smith and Others*, 324

## BANKRUPTCY.

(1). *Act of—Assignment of all Trader's Property in pursuance of prior parol Agreement.*

A trader being indebted to various persons procured from A. an advance of 200l., for which he verbally agreed to give a bill of sale of all his property if called upon to do so. On receiving the money he gave to A. a promissory note for 200l., a memorandum of agreement to assign some property expectant on the death of his wife's father, together with a policy of insurance, and also another memorandum of agreement to pay 10l. yearly as bonus. At a later period, on being requested, he executed a bill of sale of all his property to A.—*Held*: First, that such bill

of sale having been executed in pursuance of the original agreement was not an act of bankruptcy.—Secondly, that evidence of the original verbal agreement was admissible, inasmuch as the subsequent written agreement did not contain and was not intended to contain the whole agreement between the parties. *Harris and Others, Assignees of Forman, a Bankrupt, v. Rickett,* 517

(2). *Reputed Ownership.*

A trader executed a bill of sale of his stock in trade and all his other effects to the defendant, an auctioneer. On the 17th of June, in pursuance of an arrangement between the parties, the defendant came on the premises of the trader and attempted to sell the goods, but there were no buyers and nothing was sold. The defendant then left the premises, and the trader remained there and continued to carry on business till the 22nd, when he committed an act of bankruptcy. The sale had been advertized, but it did not appear that the goods were advertized to be sold as the goods of the defendant.—*Held*, that notwithstanding the attempted sale the goods were in the possession of the bankrupt as reputed owner with the consent of the true owner at the time of the bankruptcy, and therefore passed to his assignees. *Reynolds and Others, Assignees of Bate, a Bankrupt, v. Hall,* 519

(3). *Bankrupt Law Consolidation Act, 1849, s. 178—“Liability to pay Money upon a contingency”—“Debt payable on a contingency,” s. 177.*

By deed of separation between the defendant and his wife, the defendant covenanted with the plaintiff, that he would every year during the joint lives of himself and his

wife pay to the plaintiff, as a trustee for her, to her separate use, such sum as together with the dividends and interest or other income to arise from 948*l.* 6*s.* 4*d.* Bank 3 per cent. Annuities, or from other funds settled or which might be settled to her separate use and which might be received by her, would make one clear annuity or yearly sum of 200*l.*, such annuity to commence from the 11th January, 1854, and to be paid by four even and equal quarterly payments: Provided, that if the defendant and his wife should at any time hereafter cohabit as man and wife, that then and from thenceforth the said annuity should cease. On the 29th September, 1854, and while the defendant and his wife continued to live separate, the defendant became bankrupt.—*Held*, that the annual sum, so covenanted to be paid by the defendant for the separate use of his wife, was not an “annuity” within the 175th section of the Bankrupt Law Consolidation Act, 1849, nor a “debt payable upon a contingency” within the 177th section, or a “liability to pay money upon a contingency” within the 178th section; and consequently the certificate was no bar to an action for the recovery of a quarterly payment which became due after the bankruptcy. *Parker v. Ince,* 53

(4). *Bankrupt Law Consolidation Act, 1849, s. 211—Protection “till further Order.”*

On the 16th of July, 1848, the defendants, who were traders, filed in the Court of Bankruptcy a petition for arrangement, praying that their persons and property might be protected from all process until further order. On the same day a Commissioner made an order which, after reciting the petition and prayer for protection until further order,

proceeded—"I hereby grant such protection, and order that the persons and property of the petitioners be protected from process *until the 29th of July next*," and the Commissioners also thereby appointed a meeting on the 29th July at twelve o'clock at noon, for the creditors to assent to or dissent from the proposed arrangement. About eleven o'clock in the forenoon of the 29th July, the plaintiffs took in execution the defendants' goods under a writ of fi. fa. On the 3rd of August the defendants were adjudicated bankrupts.

*Held*: First, that the order was valid within the 211th section of the Bankrupt Law Consolidation Act, 1849, which enables the Court to grant protection "*until further order*," and to renew the same from time to time.

Secondly, that the protection extended to the whole of the 29th July.

Thirdly, that the order being valid the assignees under the bankruptcy were entitled to the proceeds of the execution. *Bellhouse and Another v. Mellor and Another. Proudman and Another v. Mellor and Another*, 116

(5). *Bankrupt Law Consolidation Act, 1849, s. 224—Deed of Arrangement.*

A deed of arrangement under the 224th section of the Bankrupt Law Consolidation Act, 1849, which provides for the distribution of the debtor's estate in the same manner "*as if he had become bankrupt*" on a certain day, is void: since a deed of arrangement must provide for the distribution of *all* the debtor's estate, but a bankrupt is entitled to retain certain excepted articles: Per *Martin, B., Watson, B., and Channell, B.: Pollock, C. B., dissentiente. Snodin v. Boyce*, 391

## BILL OF EXCHANGE.

*Notice of Dishonour.*

The holder of a bill of exchange, on the day after it became due, called at the office of J., the drawer, and on being told that he was engaged, wrote on a scrap of paper and sent in to him the following notice:—"B.'s acceptance to J., 500*l.*, due 12th January, is unpaid: payment to R. & Co. is requested before four o'clock."—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the notice was sufficient. *Paul, Public Officer of Stuckey's Somersetshire Banking Company, v. Joel*, 855

## BOND TO ORDINARY.

20 & 21 *Vict. c. 77*; 22 *Vict. c. 95*.

An administration bond given to the ordinary before the 20 & 21 *Vict. c. 77* came into operation, is not assignable, under the 83rd section of that Act, so as to entitle the assignee to sue upon it in his own name; and the 21 & 22 *Vict. c. 95, s. 15*, has not a retrospective effect, so as to enable the assignee to maintain an action commenced by him in his own name before that Act passed. *Young v. Hughes*, 76

## BUILDING SOCIETIES.

*Mortgage—Right to Redeem—Liability to pay subsequent Subscriptions.*

In September, 1845, a Benefit Building Society was established under the 6 & 7 *Wm. 4, c. 32*. By the Rules of the Society a subscription of 10*s.* a share per month was payable from September, 1845, until the objects of the Society were fully

accomplished. One of those objects was the formation of a fund from which money might be advanced to the shareholders to enable them to purchase freehold or leasehold property; and they were declared to be entitled to receive the sums mentioned in certain tables. One of these tables stated the amount which a shareholder was entitled to receive on each share for thirteen years, viz. 60*l.* during the first year, 120*l.* at the end of the thirteenth year, and sums varying between them in the intermediate years. The rules also declared that the advance should be secured by a mortgage, and that if any shareholder should be desirous of satisfying the security he should be at liberty to do so, "by paying the subscription that would have become due on the shares advanced, *up to the end of the thirteenth year:*" also, that when the sum of 120*l.* for each unadvanced share, with all the expenses and liabilities of the Company, should be fully realized, the Society should terminate. In June, 1851, the defendant, who was the owner of four shares, received an advance of 280*l.*, and executed a mortgage deed in which he covenanted to pay the subscriptions and interest payable on his shares according to the rules of the Society. By the 6 & 7 Wm. 4, c. 32, s. 5, an indorsement on the mortgage of the monies thereby secured vacates the same.

The Society sustained losses, and at the end of the thirteenth year there was not sufficient funds to pay the unadvanced shareholders 120*l.* a share.

*Held:* First, that the defendant was entitled to redeem his property in July 1858 (the thirteen years not terminating until the following September); but that, notwithstanding such redemption, his liability to the

payment of the monthly subscriptions continued so long as there was not realized 120*l.* per share for the unadvanced shares.

Secondly, that the covenant in the mortgage deed extended to the payment of the subscriptions subsequent to the thirteen years, and might be sued upon although the security was vacated. *Farmer and Others v. Smith,* 196

### CANAL COMPANY.

#### (1.) *The Monmouthshire Canal Company—Right to land Goods on Towing Path of.*

A Canal Act, 32 Geo. 3, c. 102, empowered the lord of any manor, &c., and the owner of any lands through which the canal should be made, to erect and use any wharfs, quays, landing places or warehouses in or upon their respective lands adjoining or near to the said canal, and to land any goods or other things upon such wharf, &c., or upon the banks lying between the same and the canal; and also to make convenient places for boats to lie and turn in, so that the making or using the same respectively do not obstruct or prejudice the navigation of the canal or any towing paths or sides thereof.—*Held*, that an owner of land adjoining the towing path had a right to erect a wharf on his own soil, and to land goods on the towing path and convey them across it to his own wharf. *The Monmouthshire Canal and Railway Company v. James Hill and W. F. Batt,* 421

#### (2.) *Right of to Use Water for Purposes other than the Canal.*

See PUBLIC COMPANY.

### CAPIAS.

See ARREST.

**CARRIER.**

*See* RAILWAY AND CANAL TRAFFIC ACT.

(1.) *Packed Parcels.*

*See* RAILWAY COMPANY, (4).

(2). *Liability of, when Agent for another Carrier with whom Contract is made.*

*See* RAILWAY COMPANY, (2).

(3). *Railway Company, Liability of, for defect of Line on which their Trains run.*

*See* ACTION (ON THE CASE) FOR NEGLIGENCE, (1).

**CHARITABLE USE.**

*See* MORTMAIN.

**CHARTER-PARTY.**

*Construction of—Lien for Freight—Rights of Indorsee of Bill of Lading.*

By a charter-party, made between the defendant and H., a ship was chartered to proceed to Madras and load a cargo there from the agents of H., and being so loaded proceed to London and deliver the same on being paid freight at 3*l.* 15*s.* a ton, &c.; "the captain to sign bills of lading for his cargo for any rate of freight required, without prejudice to this charter-party." C. S., who acted as agent of H. at Madras in respect of the charter-party, by his directions purchased sugars and loaded them on board. The captain, at the request of C. S., signed a bill of lading, deliverable to the order of C. S. at 1*l.* per ton freight. H. stopped payment and never paid for the sugar. The sugar having arrived in London.—*Held*, that C. S., or the parties in London who represented

him, were entitled to the sugar on payment of the bill of lading freight. *Francis Shand and A. Shand v. William Sanderson*, 881

**COMMISSIONERS OF NAVIGATION.**

*Action Against.*

*See* DAMAGES.

**COMMON LAW PROCEDURE ACT, 1852.**

(1). *Sect. 18.—Writ for Service out of Jurisdiction—Setting Aside.*

A writ, issued in pursuance of the 18th section of the Common Law Procedure Act, 1852, for service, and served on, a British subject out of the jurisdiction, may be set aside, on the application of the defendant, if it is shewn that there was no cause of action which arose within the jurisdiction. *Binet v. Susan Picot*, 865

(2). *Sect. 139.—Entering Judgment.*

The mere entry of judgment is sufficient within the 139th section of the Common Law Procedure Act, 1852, which enacts "that the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after the verdict;" and it is not necessary to perfect the judgment by taxation of costs. *Fewins v. Lethbridge*, 418

**COMMON LAW PROCEDURE ACT, 1854.**

(1). *Sect. 34—Appeal.*

The right of appeal given by the 34th section of the Common Law Procedure Act, 1854, applies to a feigned issue under the Interpleader Act. *Withers v. Parker*, 810

(2). *Sect. 51.*

Under the 51st section of the Common Law Procedure Act, 1854, interrogatories may be administered, the public officer suing on behalf of a banking company carrying on business in copartnership under the 7 Geo. 4, c. 46. *McKewan Public Officer, &c. v. Rolt*, 738

## CONDITION PRECEDENT.

*See CONTRACT OF SALE, (2).*

## CONSTABLE.

*See TRESPASS, (3).*

## CONTRACT.

(1). *Evidence of Acceptance of Offer.*

*See INSURANCE, MARINE, (2).*

(2). *For Sale of Land—Conditions Precedent—What are.*

To a declaration on an agreement, setting out that "the plaintiff had agreed to sell, and that the defendants had agreed to purchase of the plaintiff one fourth share in a mining sett for 250*l.*; and that the plaintiff and the defendants agreed forthwith to form a company, to be registered with limited liability, for working the mining sett; and that, so soon as the company should be registered with limited liability, the defendants would pay to the plaintiff the sum of 250*l.*, as thereinbefore stated;" assigning as a breach non-payment of the 250*l.*; the defendants pleaded; first, that the plaintiff had not at the time of making the agreement, nor hath he now, any title to the said one fourth part or share in the said mining sett, nor any right or title to convey the same. Secondly, that the plaintiff never has been at any time ready and willing to convey the said

one fourth share to the defendant according to the agreement.—*Held*, that the pleas were good. *Marsden v. Moore and Day*, 500

(3). *For Sale of Goods.*

*See SALE OF GOODS.*

(4). *Warranty—Construction.*

The plaintiff having heard that the defendant had some barley to sell, went to his counting-house, when his agent produced a sample which he said was "seed barley," offered it to the defendant at 39*s.*, and if the plaintiff would take it at 40*s.* he might have it. The plaintiff looked at the barley and said it was a good sample of seed barley, and agreed to buy it. At the plaintiff's request the defendant wrote to the person who had offered it to him, saying that he would accept it, and asking what sort it was as it would do well for seed. The plaintiff afterwards sold it under a warranty in writing as "Chevalier seed barley." It turned out that it was "barley big," a species of barley unfit for malting purposes; and the person to whom the plaintiff had sold it recovered damages against him for the breach of warranty.—*Held*:—First, that there was no warranty by the defendant that the barley was "seed barley." Secondly, that the contract was satisfied by the delivery of barley fit for sowing; and that if the term "seed barley" meant barley fit for malting purposes, that ought to be shewn by clear and irresistible evidence. *Carter v. Crick*, 412

(5). *"Free on Board"—Indorsement of Bill of Lading by Vendor—Vesting of Property.*

The defendants, merchants at

Bristol, through a broker contracted to buy of the plaintiffs, merchants at Rotterdam, ten tons of the best refined rape oil, to be shipped "free on board" at Rotterdam in September, 1857, at 48*l*. 15*s*. per ton, to be paid for on delivery to the defendants of the bills of lading, by bill of exchange to be accepted by the defendants payable three months after date, and to be dated on the day of shipment of the oil. On the 8th of September, the plaintiffs (having on the previous day advised that the shipment would be made) shipped on board a general ship, trading between Rotterdam and Bristol, five tons of the oil, and the master signed a bill of lading by which the oil was deliverable "unto shipper's order," and the plaintiffs indorsed it specially to the defendants. On the same day the plaintiffs inclosed in a letter to the broker the bill of lading, invoice and bill of exchange drawn in accordance with the contract. On the night of the 9th the ship with the oil on board was run down in the Bristol Channel, and the oil totally lost. The plaintiffs' letter of the 8th arrived at Bristol on the afternoon of the 10th in due course of post, but after business hours. On the morning of the 11th the broker left with defendants the bill of lading, invoice, and bill of exchange for their acceptance. At that time he knew of the loss of the ship. In about two hours afterwards the defendants returned to the broker the documents left with them, on the ground that, under the circumstances, they were not liable to pay for the oil. In an action for not accepting the bill of exchange, and for goods sold and delivered, the jury stated that in their opinion, according to mercantile usage, the risk of the loss of the oil was on the defendants.—*Held*, in the Exchequer

Chamber (affirming the judgment of the Court of Exchequer), that the property in the oil passed to the defendants when it was placed "free on board" in performance of the contract.

*Held* also, that it was a question for the jury whether the plaintiffs so shipped the oil in performance of the contract to place it "free on board," or for the purpose of retaining a control over it and continuing to be owners contrary to the contract. *Browne and Another v. Hare and Another*, 822

# COPYRIGHT OF DESIGN.

*See DESIGN.*

## COSTS.

- (1). *Where damages recovered under 40*s*.*

To an action for libel in a newspaper, the defendant pleaded, under the 6 & 7 Vict. c. 96, s. 2, the insertion of a full apology and payment of 40*s*. into Court. The jury having found that the apology was not sufficient, but that the 40*s*. paid into Court was sufficient to cover the damage, the Judge directed a verdict for the plaintiff with 1*s*. damages.—*Held*, that the plaintiff was deprived of costs, by the 3 & 4 Vict. c. 24, s. 2.

*Seem*, that the jury should have assessed the damages irrespective of the 40*s*. paid into Court, and that the defendant was entitled to have such sum returned to him. *Lafone v. Smith*, 158

- (2). *County Court Act, 9 & 10 Vict. c. 95, s. 108—Carrying on business.*

A Company, carrying on business in London, which employs in a country town a general commission agent, who transacts the Company's busi-

nees in such town, in an office for which the Company pay him rent, do not "carry on business" in that town within the meaning of the County Court Act, 9 & 10 Vict. c. 95, s. 128. *Corbett v. The General Steam Navigation Company*, 482

(3). *County Court Act, 9 & 10 Vict. c. 95, s. 128—Certificate when to be given.*

The plaintiff, who lived more than twenty miles from the defendant, sued the defendant for a debt of 15*l.*, for which a plaint might have been entered in a County Court, and was nonsuited. The Judge did not certify that the action was fit to be tried in a superior Court.—*Held*, that the defendant was not entitled to costs as between attorney and client by 9 & 10 Vict. c. 95, s. 129.

*Seem*, that under the section in question the Judge may certify at any time after the trial. *Mason v. Tucker*, 536

#### COUNTY COURT.

(1). *Jurisdiction of Superior Court under 19 & 20 Vict. c. 108, s. 43.*

An insolvent filed his petition in a County Court and obtained an order for protection from process until the day appointed for his first examination. On that day his attorney applied to the County Court judge for leave to withdraw the petition, on the ground that the date on which it was presented did not appear upon it. The application was opposed by several creditors, and the County Court judge refused it, and adjourned the examination of the insolvent sine die.—*Held*, that the County Court judge having adjudicated upon the matter, this Court had no power, under the 19 & 20 Vict. c. 108, s. 43, to order him to remove the petition from the file, or

#### DAMAGES.

dismiss it, or name a day for the hearing. *In re William Corbett, an Insolvent Debtor*, 463

(2). *Appeal—Practice.*

A party desirous of appealing from a decision of a County Court judge, having given notice of appeal, under the 13 & 14 Vict. c. 61, s. 14, within ten days deposited with the registrar a sum equal to the amount for which he was required to give security, for which the registrar gave an acknowledgment, but did not deposit a written memorandum, setting forth the conditions on which the money was deposited, pursuant to the 19 & 20 Vict. c. 108, s. 71.—*Held*, that the want of such memorandum was no objection to the hearing of the appeal. *Griffin v. Coleman*, 265

#### COVENANT.

*By Assignee of Reversion by Estoppel.*

*See ESTOPPEL, (2).*

#### DAMAGES.

*See DEATH BY ACCIDENTS, COMPENSATION.*

(1.) *Remoteness.*

An Act enabling navigation Commissioners to grant a lease of a canal contained a clause as follows:—In case the lessees during the term should permit the navigation to be out of repair, the Commissioners "are hereby authorized and required to give notice thereof to such lessees, &c., and in such notice to specify the particular repairs which ought to be done; and the Commissioners may by such notice require that such repairs should be commenced, proceeded with and finished within reasonable periods to be named by the Commissioners, and in case the

lessees shall neglect to commence, &c., such repairs, &c., then it shall be lawful for the Commissioners and they are hereby authorized to take possession of the tolls, &c., and to cause such repairs to be done under their own direction, and to pay the necessary expenses of making such repairs out of the said tolls," &c. The lease having been granted in pursuance of the Act, during its continuance one of the locks of the canal became out of repair, but the Commissioners, though they knew of the want of repair, gave no notice of it to the lessee though a sufficient time had elapsed for the giving of such notice. A barge entered the canal while the lock was so out of repair, but was prevented from getting out again by the falling in of the lock.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that, assuming a duty in the Commissioners to give notice to the lessee to repair, they were not liable in an action by the owner of the barge for neglecting to give such notice, inasmuch as the detention of the barge was not a damage naturally flowing from their neglect.

*Semble*, that no action was maintainable against the Commissioners for their neglect to give notice. *Walker v. Goe and Another, Clerks, &c.*, 350

*See further* ACTION (ON THE CASE) FOR DECEIT, (1).

(2). *Penal Sum for Nonperformance of Agreements—Penalty—Liquidated Damages.*

By an agreement in writing, the plaintiff agreed to "sell and the defendant to purchase the household furniture, stock in trade, &c., by valuation; B. to value for plaintiff and M. for defendant; the goods to

be valued, and possession given on or before the 13th of October, 1858; and in the event of either of the parties not complying in every particular set forth in this agreement, he should forfeit and pay the sum of 50*l.*, and all expenses attending the same." The defendant did not take possession of the goods, which the plaintiff subsequently sold to another person. In an action for the breach of the agreement, the defendant paid into Court 5*l.* The jury having found a verdict for the defendant: on motion to enter a verdict for the plaintiff for 45*l.*:—*Held*, that the sum of 50*l.* was a penalty and not liquidated damages; and therefore that the defendant was entitled to retain the verdict. *Betts v. Burch*, 506

(3). *In Trespass for Illegal Distress.*

*See* DISTRESS.

DEATH BY ACCIDENTS,  
COMPENSATION.

*Damages.*

In an action, on the 9 & 10 Vict. c. 93, by a father for injury resulting from the death of his son, it appeared that the father was a working mason and that the son was a boy of fourteen years of age who had earned 4*s.* a week for about a year or two, but at the time of his death was without employment. There was no evidence of the cost of boarding and clothing the boy. The Judge having left it to the jury to say whether the father had sustained any pecuniary loss by the death of his son, and the jury having found a verdict with 20*l.* damages:—*Held* that, as there was evidence for the jury, the plaintiff was entitled to retain the verdict for the full amount.

Such an action cannot be maintained without some evidence of

action pecuniary damage. *Dock-  
worth, Administrator of Ingle Dock-  
worth, deceased, v. Johnson.* 653

### DEFAMATION.

*In Affair was in a Judicial Pro-  
ceeding.*

No action lies against a party who  
in the course of a cause, makes an  
affidavit in support of a summons  
taken out in such cause, which is  
substantive, true and material,  
though the person examined, and  
who complains, is not a party to  
the cause. *Emmerson v. Elizabeth  
Barnard.* 349

*See Joint Stock Company. 31.*

### DESIGN.

*Copyright — This is a New and  
Original Design.*

The plaintiff exhibited under the  
3 & 4 Vict. c. 34, a design for a  
mechanical contrivance. The design  
was applied to a letter press in relief  
called "The Emancipated Prisoner,"  
and it consisted of a representation of  
the large and small compartments, so  
as to form a large compartment above  
a small compartment. The  
large compartment was not new and  
the small compartment was not new,  
but they had never been used in  
combination before the plaintiff re-  
quested that design. That design  
had never been used as a single com-  
partment of a large and small pattern.  
It is action against the defendant  
for infringing the plaintiff's privi-  
lege: — *How* in the *Emancipated  
Prisoner*, whereby the plaintiff is  
the owner of the design, and the  
plaintiff sought was a "new and  
original design" within the mean-  
ing of the 3 & 4 Vict. c. 34. *For-  
man and Jackson v. Taylor.* 357

### DEVISE.

*Description of Subject — This is  
an original.*

H. in 1800 purchased a tract called  
"Tip Brock Close," containing 2  
2 R. 12 P. In the same year he purchased  
acres were situated in him by the  
Commissioners under an Act of 1800.  
The act was passed in the same  
year. One year, containing more  
than four acres, he purchased in  
possession, and made a partition  
between it and the old inclosure by  
a short passage, and then made it  
his house he occupied and used the  
whole as one close of ground and  
called it "Tip."

By his will in 1825 he devised to  
his son James "all that tract of land  
of which he was in possession and  
which he called 'Tip Close,' containing  
six acres more or less, being part of  
an inclosure made by the  
Commissioners in or at the time of the  
inclosure of James's Field." — *Test.*  
That there was evidence in the  
case that the old and new inclosures  
were the same and the old inclosure was  
part of the same tract of land as the  
new inclosure. *James v. James.* 358

### DISTRESS.

*For Rent — Plaintiff's Claim  
Damages for Distress.*

Let this and young James, the  
plaintiff, in or about the year 1800, at the  
plaintiff's, and the defendant's, joint re-  
quest, he purchased from the defendant  
in 1800 a piece of land for a garden  
in the year 1800 the defendant, the  
plaintiff, in or about the year 1800, at the  
plaintiff's, and the defendant's, joint re-  
quest, he purchased from the defendant  
the premises situated in the year 1800.  
The plaintiff is owner, and the

sold under a distress for rent, which was unlawful because there were other goods on the premises belonging to him which might have been distrained for the same rent, is entitled to recover from the distrainer, not merely nominal damages, but the full value of the sheep so seized. *Keen v. Priest*, 236

(2). *Damage Feasant — Defect of Fences—Reasonable Time for Removal of Straying Cattle.*

Where cattle passing along a public highway stray into an adjoining field, through defect of fences, the owner of the cattle is bound to remove them within a reasonable time; and what is a reasonable time is not to be determined by the Judge, but is a question for the jury, with reference to all the surrounding circumstances. (Per *Pollock*, C. B., *Martin*, B., and *Channell*, B. *Bramwell*, B., dissentiente.)

In the month of November, between five and six o'clock in the evening, the plaintiff's drovers were driving thirty-six bullocks along a public highway, when thirteen of them strayed into the defendant's field through a gap in the fence. The drovers left them in the field and drove the other twenty-three to the nearest public-house, where they lodged them for the night. In about an hour the drovers returned to the field for the thirteen, but in the mean time the defendant had impounded them. There was nothing to prevent the drovers from immediately driving them out of the field except that they wished to take care of the others. The plaintiff having brought an action of trespass against the defendant for impounding his bullocks, the learned Judge ruled that as the drovers did not at once proceed to drive the bullocks out of

the defendant's field, but left them there while they took the others to a place of safety, they did not remove them in a reasonable time, and directed a verdict for the defendant.—*Held*, a misdirection. (Per *Pollock*, C. B., *Martin*, B., and *Channell*, B. *Bramwell*, B., dissentiente.) *Goodwyn v. Cheveley*, 631

EASEMENT.

(1). *Right to Water.—Cesser of by conversion of Canal into Railway.*

An easement to take water to fill a canal ceases when the canal no longer exists.

By 59 Geo. 3, c. xiii., a Company was incorporated for the purpose of making a canal, and empowered to supply the canal with water from certain rivers. In 1824 the canal Company made a cut and erected on it a water wheel for pumping water into the canal. The canal Company occasionally used the water wheel to drive a bone crushing mill. In 1853 the 16 & 17 Vict. c. cxix., for converting the canal into a railway, after repealing the 59 Geo. 3, c. xxii., reincorporated the Company for the purpose (inter alia) of making the railway. By section 10, it was enacted that easements, &c., vested in the canal Company, should after the passing, &c., be vested in the Company thereby incorporated for their absolute benefit. By section 11, that all "titles by possession" acquired, &c., by the canal Company should be as good in favour of the Company thereby incorporated as the same were good immediately before the passing of that Act in favour of the canal Company." The 83rd section provided, that in case any of the works, &c., used for the purposes of the canal should in con-

sequence of the stopping up of the canal be no longer required for the purposes of the Act, the works which should be no longer required might be sold by the Company in the manner provided by the Lands Clauses Consolidation Act, 1845, with respect to the sale of superfluous lands. The canal having been stopped up and converted into a railway: *Held*, that on the conversion of the canal into a railway the right of the Company to the flow of water in the cut for driving the wheel ceased, and, that the railway Company could not convey to a purchaser any right to such flow. *The National Guaranteed Manure Company v. Donald*, 8

(2). *Right of Support from Foundations.*

See MINING.

(3). *Right of Support of Surface.*

See RAILWAY CLAUSES CONSOLIDATION ACT.

(4). *Right to Lateral Support.*

See PLEADING.  
DECLARATION.

(5). *Support of House by Neighbouring Houses.*

The plaintiff was the owner of a house built on a hill having a descent towards the west. Next to the plaintiff's house was one belonging to another person, which adjoined a house belonging to the defendants. For upwards of thirty years the three houses had been out of the perpendicular leaning towards the west. There was no evidence how the leaning originated, but it might have been seen by any person passing in the street. It did not appear when the houses were built, or that

there had been any connection between them either in title, possession, or occupation. The lease of the defendants' house, which was the lowest or westernmost, having expired, and the house being out of repair, the defendants agreed with one R. that R. should pull down the house and rebuild it, and that the defendants would then grant R. a lease. R. pulled down the defendants' house. The house adjoining sank further towards the west, and the plaintiff's house, having lost its support, then fell down.

*Held*, that, the defendants' house not adjoining the plaintiff's house, the plaintiff had acquired no right to have his house supported by the defendants' house.

*Quere*, whether he would have acquired any such right if the plaintiff's house had immediately adjoined the defendants' house.

Per *Bransell, B.*, that there was nothing to shew that the plaintiff's enjoyment of support for his house by the defendants' house had been open and as of right. *Solomon v. The Master, Wardens and Commonalty of the Mystery of Vintners in the City of London*, 585

ESTOPPEL.

See LANDLORD AND TENANT, 1, 2

(1). *By Conduct, where no Intention to Deceive.*

If any person, by actual expressions or by a course of conduct, so conducts himself that another may reasonably infer the existence of an agreement or licence, and acts upon such inference, whether the former intends that he should do so or not, the party using that language, or who has so conducted himself, can-

not afterwards gainsay the reasonable inference to be drawn from his words or conduct.

G., the foreman of the plaintiff, a lithographic printer, employed by him to get orders for printing, being desirous of publishing certain maps and other works for himself, agreed with the defendant, a publisher, to supply maps, &c., to him to be sold on commission. He then entered an order as from the defendant in the plaintiff's order book. Maps and other goods were supplied to the defendant from the plaintiff's premises, some of them accompanied by delivery notes requesting the defendant to receive the goods from the plaintiff. Receipts to the same effect were signed by the defendant. The plaintiff made out an account amounting to 108*l.*, charging the defendant, and handed it to G., who shewed it to the defendant. The defendant accepted bills for a part of the amount of this account and gave the balance in cash to G., who handed the cash and bills to the plaintiff. Other goods being supplied, the plaintiff sent the invoice of them to the defendant charging him with the price. The defendant applied to G. for an explanation, and, on being told by G. that it was a mistake, took no steps to inform the plaintiff. The jury found that the defendant did not authorize G. to use his name in ordering the goods; but that from the manner in which the defendant had acted the plaintiff believed that he was selling the goods to the defendant.—*Held*, that the defendant was liable to the plaintiff for the price of the goods. *Cornish v. Abington*, 549

(2). *Assignment of Reversion by Estoppel—Covenant.*

If any estate or interest passes  
K K K 2

from a lessor, or his real title is shewn upon the face of the lease, there can be no estoppel.

If a lessor has no title, and the lessee be evicted by title paramount, he may plead that as a defence to an action by the lessor.

But so long as a lessee continues in possession under the lease, he cannot set up any defence founded upon the fact that the lessor "nil habuit in tenementis;" and upon the execution of the lease there is, in contemplation of the law, created in the lessor a reversion in fee simple by estoppel which passes by descent to his heir and by purchase to his assignee or devisee, who may sue on the covenants in the lease.

J. B., being mortgagor in possession, on the 22nd of February, 1848, by indenture, executed by him and the defendant, demised to the defendant certain premises for seven years at a yearly rent. The lease contained a covenant by the defendant with B., his heirs and assigns, to repair the premises, J. B. finding iron and wood for that purpose. On the 2nd of February, 1854, J. B. executed an indenture, whereby, after reciting that the premises were mortgaged and that he had sold the equity of redemption to the plaintiff, he "granted, bargained and sold, aliened, released and surrendered the premises, and all his estate, right and title, both at law and in equity therein, to the plaintiff: to have and to hold to him, his heirs and assigns, for ever." The defendant paid rent to J. B. until the execution of this indenture, and after that time to the plaintiff. The plaintiff sued the defendant for a breach of the covenant to repair; and the declaration, after stating the lease and covenant, alleged that J. B. by deed assigned the premises to the plaintiff; whereby the reversion thereof, subject to

the term created by the lease, vested in him. The defendant pleaded, secondly, that J. B. did not assign the premises to the plaintiff; nor had he at the time of making of the lease any reversion of and in the premises; nor did any reversion in the premises come to the plaintiff. Fourthly, that J. B. did not nor would, nor did nor would the plaintiff, find iron or wood, as in the covenant mentioned.

*Held*, that the plaintiff was entitled to have the verdict on the second plea entered for him, for the defendant was estopped from disputing that J. B. was seised of an estate in reversion; and as there were apt words in the assignment to convey a legal estate in fee in reversion to the plaintiff, the estoppel continued in his favour, notwithstanding the assignment to him shewed the want of title, and consequently he might sue on the covenants in the lease as assignee of the reversion.

*Held* also, on demurrer to the fourth plea, that it was bad; and that, although the declaration was informal for not alleging that J. B. was seised of some estate which by assignment would pass to the plaintiff as assignee, yet sufficient appeared in the declaration to shew that the plaintiff claimed to be assignee of an estate in reversion, and therefore, formerly, the objection would only have been open (if at all) on special demurrer; and now the remedy was by an application under the 52nd section of the Common Law Procedure Act, 1852. *Cuthbertson v. Irving*, 742

(3). *Who not Privies—Execution Creditor.*

A sheriff who comes to seize the goods of a debtor under a writ of

execution is not bound by an estoppel, which might have prevented the debtor himself from claiming the goods.

M., being the owner of goods, procured H. to assign them by bill of sale to R., to secure an advance of money. R. took the goods bona fide, and upon the assurance of M. that the goods belonged to H. The goods were afterwards seized under a fi. fa. as the goods of M. On the trial of an interpleader issue between R. and the execution creditor, the jury found that there had been no actual transfer of the goods from M. to H. *Held*, that R. had acquired no title to the goods as against the execution creditor. *Richards v. Johnston*, 660

EXCISE.

(1). *Licence to Sell Beer by Retail—Householder.*

The 2nd section of the 3 & 4 Vict. c. 61, which enacts "that every applicant for a licence to retail beer shall produce to the officer of excise a certificate from an overseer, that he is the real resident holder and occupier of the house in which he shall apply to be licensed," is directory only, and therefore a licence may be valid, notwithstanding the certificate omits to state that the applicant is such householder.

But a licence granted to a person who is not in fact such householder is void, the 1st section of the Act being imperative. *Thompson, Appellant, Harvey, Respondent*, 254

(2). *Paper.*

The defendant having reduced to pulp, in a paper mill, the fibrous portion of hides, which he took up, dried and pressed into sheets, by a

process similar to that of the manufacture of paper, produced an article resembling parchment, and applicable to ordinary purposes for which paper is employed:—*Held*, that such article was liable to duty as “paper,” by the 2 & 3 Vict. c. 23, ss. 1, 56, and that, not having taken out a licence as a paper maker, the defendant was liable to penalties by 6 Geo. 4, c. 81, s. 26. *The Attorney General v. Barry*, 470

## EVIDENCE.

*Parol, to add to Written Agreement.*

*See* BANKRUPTCY, (1).

## FALSE IMPRISONMENT.

*See* TRESPASS.

## FALSE REPRESENTATION.

*See* ACTION ON THE CASE FOR DECEIT.

## FOREST OF DEAN.

(1). 1 & 2 Vict. c. 43, s. 68—*Award of Deputy Gaveller*—“*Lands*.”

The 68th section of the 1 & 2 Vict. c. 43, for regulating the working of mines in the Forest of Dean, provides that every free miner entitled to any gale within any inclosed lands, shall pay to the owner of such lands compensation for surface damage occasioned by opening or working any gale *therein or thereon*, which compensation shall be determined by the gaveller or deputy gaveller; and if not paid within ten days after making an award by him, and a copy thereof served on the party required to pay the same, the amount may be recovered by action. The declaration in an action under

that section, alleged that the deputy gaveller awarded that the amount of compensation for surface damage done to the inclosed lands of the plaintiffs, by the working of a gale therein or *thereon* by the defendant, was 60*l*. The plea set out the award, by which the deputy gaveller, after reciting that application had been made to him to determine the compensation for surface damage to lands *and buildings* of the plaintiffs, alleged to be inclosed lands, awarded that the amount of compensation for surface damage to the said lands *and buildings*, by reason of the working thereon and *thereunder* by the defendant, was 60*l*.; but whether the said lands and buildings were inclosed lands within the statute he made no award.

*Held*: First, that the award was good, although the deputy gaveller had not found that the lands were inclosed.

Secondly.—That, assuming, “surface damage” to mean damage on the surface, the award was not bad, because the deputy gaveller had found that the damage was occasioned by working *under* the lands, for by such working there might be damage on the surface.

Thirdly.—That as the word “lands” comprehends buildings, the declaration was good, although it appeared by the award that the compensation was in respect of the land and buildings. *Allaway and Another v. Wagstaff*, 307

(2). *Surface Damage—Jurisdiction of Deputy Gaveller.*

By “An Act for regulating the opening and working of mines and quarries in the Forest of Dean and Hundred of St. Briavels,” 1 & 2 Vict. c. 43, s. 68, it is enacted that every free miner and other person

who is or may be entitled to any gale, pit, level or work within any inclosed land of the Hundred of St. Briavels, shall be, and he is hereby required to pay to the owners of any such inclosed lands full and fair compensation for any surface damage by the opening or sinking of any gale, pit, level or work therein or thereon, which compensation shall be ascertained by the gaveller or deputy gaveller. The plaintiff being the owner of a house standing on an open common within the Hundred, but adjoining on one side a yard of the plaintiff inclosed by a wall, the defendant, a free miner, in working his gale, got the coal from under the house, in consequence of which a subsidence took place, the foundation of the house sank and the walls cracked.

*Held*, that the defendant was liable to an action for causing a subsidence of the surface; but that the damage so done to the plaintiff's house was not "surface damage" within the meaning of the 68th section, and that the deputy gaveller had no jurisdiction to award compensation.

*Semble*, that, the house standing on uninclosed land of the Hundred and being open on three sides, was not "inclosed land" within the meaning of the 68th section. *Allaway and Another v. Wagstaff*, 681

### FORFEITURE, WAIVER OF.

*See* LEASE.

### FRAUDS, STATUTE OF.

#### *Sect. 4—Promise to Answer for the Default of Another.*

One Dalton wanting money, he and the defendant applied to the plaintiff to draw a bill, to be accepted by Dalton and indorsed by the de-

fendant, and the defendant promised the plaintiff that he should not be called upon. The jury found that Dalton and the defendant were both principals in the transaction.

*Held*, that the plaintiff having paid the bill was entitled to recover without proof of a promise in writing under the 4th section of the Statute of Frauds. *Batson v. King*, 739

### FREIGHT, LIEN FOR.

*See* CHARTER-PARTY.

### GAMING.

9 Ann. c. 14—*Security*—5 & 6 Wm. 4—*Evidence*.

The defendant, being indebted to the plaintiff and other persons for money lost by betting on a horse race, applied to the plaintiff for a loan. The plaintiff lent the defendant 2000*l.* upon the security of a deed, which assigned to the plaintiff certain policies of assurance, and contained a covenant by the defendant to pay the 2000*l.*, and interest. On the settling day the defendant paid the plaintiff his bets out of the 2000*l.* In an action by the plaintiff on the covenant, the defendant pleaded that the deed was a mortgage security, part of the consideration for which was a gaming debt. At the trial the Judge told the jury that if the 2000*l.* was advanced in pursuance of a stipulation or agreement between the plaintiff and defendant that out of it the plaintiff should be paid the money which he had won of the defendant by betting it was a mere colourable loan and evasion of the statute; but that if there was no such stipulation or agreement, and the plaintiff advanced the 2000*l.* as a loan for the defendant to dispose of as he pleased, the deed was valid, although the plaintiff expected

to be paid out of the money so lent. — *Held*, in the Exchequer Chamber, on a bill of exceptions, that the direction was right. *Hill v. Fox*, 359

## GUARANTEE.

*In Consideration of Agreement—  
Effect of, when not executed by  
Party seeking to enforce it.*

J. E. & Co. being indebted to the plaintiffs who were bankers, the defendants by a writing expressed to be made between the plaintiffs and the defendants, in consideration of the agreement thereafter contained on behalf of the plaintiffs, agreed that they would pay all monies which then were or at any time should be due from J. E. & Co. to the plaintiffs, not exceeding 35,000*l.*, by instalments of 3000*l.* a year for five years, and two subsequent annual instalments of 10,000*l.*; and in consideration of the above the plaintiffs agreed that they would not charge more than 5 per cent. interest to J. E. & Co.; and when all debts of J. E. & Co., except 15,000*l.*, should have been paid, would grant them a full release. This agreement was signed by the defendants, and handed by them to the plaintiffs who had pressed for it. The plaintiffs had acted upon, but never executed it.— *Held*, that the agreement was binding upon the defendants notwithstanding that it had not been executed by the plaintiffs. *The Liverpool Borough Bank v. Thomas Eccles, Richard Eccles and Another*, 139

## HIGHWAY.

*Action on the Case, for leaving an  
Unfenced Hole near a Public  
Highway.*

Where an excavation is made near to, but not substantially adjoining, a public highway, at common law no

action lies against the owner of the land by a person who has strayed off the highway and fallen into such excavation. *Ann Hardcastle, Administratrix of Thomas Hardcastle, v. The South Yorkshire Railway and River Dun Company*, 67

## INCLOSURE ACT.

*Roads—Stopping up—Evidence—  
Presumption—Order of Justices.*

By The General Inclosure Act, 41 Geo. 3, c. 109, s. 8, in case the Commissioner shall be empowered to stop up any old or accustomed road passing through any part of the *old inclosures*, &c., the same shall in no case be done without the concurrence or order of two justices. The 53 Geo. 3, c. lxi. (The Flint Inclosure Act), by s. 1, appointed a Commissioner to carry the Act into execution, subject to such of the regulations, restrictions and provisions, &c., in the 41 Geo. 3, c. 109, as were not altered, varied, controlled by, or repugnant to, the provisions of that Act. Sect. 19 enacts, that it shall be lawful for the Commissioners to stop up any old or accustomed public road or roads over the *marshes, commons and waste lands*, subject nevertheless to the concurrence of two justices, and under such regulations as are contained in 41 Geo. 3, c. 109, and provided that the old roads should not be discontinued till the new roads were properly formed. The marshes were allotted in 1819, when a gate, which had since been kept locked, was put up across an old road, but the road had since been used by foot passengers occasionally. The award of the Commissioners, executed in 1830, set out the new roads, and directed the old roads to be stopped up. A certificate of two justices, that the new roads had been

formed and completed, under the 9th section of 41 Geo. 3, c. 109, was put in and proved; but no order of two justices for stopping the old road was produced.—*Held*, in the Exchequer Chamber (affirming the decision of the Court of Exchequer), that it might be presumed that an order of two justices for stopping up the old road had been duly made. *Williams v. Eyton*, 357

### INCOME TAX.

*Liability of Foreign Firm buying Goods here for Sale Abroad.*

S. was a partner in the firm of L. S. and Co.: he resided at Nottingham; the other parties residing at New York, in the United States, where their principal business was carried on. At Nottingham the defendant transacted the business of the firm in England, which consisted of purchasing and shipping goods for exportation. No money was received in England except from New York. The profits were made by the resale of goods at an increased price in America. A large part of the profits of the firm in America was made by the resale of goods purchased in America, France and Germany.

*Held*:—First, that the firm was liable to pay income tax upon the profits realized in America upon the resale of goods purchased in England and exported from thence.

Secondly.—That S., the partner resident in England, was bound to make a return of such profits on behalf of the firm. *The Attorney General v. Sulley*, 709

### INFANT.

*Remedy against Attorney employed by Prochein Amy.*

An attorney who, as attorney for

### INSURANCE AGAINST FIRE.

the plaintiff in an action by an infant suing by prochein amy, has received the damages and costs recovered from the defendant in such action, is liable to the infant in an action for money had and received. *Frederick Henry Collins, by Henry Collins his next Friend v. Brook*, 270

### INSPECTION OF DOCUMENTS.

(1). *By Defendant in Action of Libel.*

See PRACTICE, (3).

(2). *Costs of.*

See PRACTICE, (4).

### INSURANCE AGAINST FIRE.

(1). *Alteration of Premises where no Increase of Risk.*

The plaintiffs had effected, with the Norwich Union Fire Insurance Society, a policy of insurance, which contained (amongst others) the following condition:—“Every policy issued by this Society will be void unless the nature and material structure of the buildings and property insured, and of all buildings which contain any part of the property insured, be fully and accurately described in such policy, and unless the trades carried on in all such buildings be correctly shewn; and unless it is stated in such policy whether any hazardous goods are deposited in any such buildings; and whether there be any stove or apparatus for producing heat (other than common fire places in private houses) used or employed in such buildings, or in any building, yard, or other place adjoining or near to the property insured, and belonging to or occupied by the party insured; and if there be any building of a

hazardous nature or structure, or in which hazardous trades are carried on or hazardous goods deposited, belonging to or occupied by the party insured, adjoining or near to the property insured, the same must also be specified in the policy, or it will be void."—The plaintiffs, who were carriers, in 1843, erected on the premises insured a steam-engine which they used for hoisting goods. This steam-engine was specified in the policy. The plaintiffs in 1844 applied the steam-engine to grinding provender for their horses. They attached to it a horizontal shaft, which was carried through the floor to an upper room where they erected winnowing and grinding machines. The policy was renewed in 1857. The Society had no knowledge of the erection of the additional machinery or that the steam-engine was used for grinding. The premises having been destroyed by fire:—*Held*, that the alteration did not avoid the policy, the jury having found that there was no increase of risk. *Baxendale and Others v. Harvey*, 445

(2). *Evidence of Breach of Covenant to Insure.*

See LEASE.

INSURANCE (MARINE).

(1). *Abandonment after Total Loss—Forwarding Cargo—Rights of Owner and Underwriters.*

A ship having been chartered to carry troops to Calcutta, by a charter-party, under which a portion of the freight was made payable on the completion of the voyage, when about 700 miles beyond the Mauritius caught fire. The ship put back to the Mauritius, where, being found to be greatly damaged, she was

abandoned to the underwriters as totally lost, and the abandonment was accepted. The captain having chartered another ship and forwarded the troops to Calcutta, the freight was received by the shipowner's agents.—*Held*, that in forwarding the troops the captain acted as agent for the owner, and not for the underwriters; and that the underwriters, to whom the ship had been abandoned, were not entitled to any benefit from the freight so received. *Hickie and Borman v. Rodocanachi*, 455

(2). *Time policy on Ship.—Concealment of material Fact—Evidence—Acceptance of Offer to become Insurer.*

The plaintiff, who was the agent in London of some foreign owners of the steam-ship "B.," being instructed to cause the ship to be insured by a time policy for a year, from the 20th of January, 1857, employed H. and Co., insurance brokers, to effect the insurance.

On the 15th of January H. and Co. applied to the defendant to become an insurer. On the 15th the plaintiff received a letter from the captain of the ship informing him that the vessel had been aground and had received some very heavy blows, and had made her way in a sinking state to the port of Carthage where she then was. On the same day the plaintiff communicated this letter to H. and Co., but H. and Co. did not communicate it to the defendant. On the 16th the defendant agreed to become an insurer for 3000*l.*, and debited H. and Co. for the premium. On the 22nd the plaintiff, finding that no notice of the accident had reached London, sent an extract from the captain's letter to Lloyd's. The defendant,

who was then for the first time informed of the fact that the ship had been on shore, wrote to H. and Co. as follows:—"Understanding that the ship 'B.' has been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired." This letter was not answered by H. and Co. The debit of H. and Co. in the books of the defendant remained till after the loss. The ship was surveyed and repaired and reported to be perfectly right, and in a condition to undertake a voyage of any description on the 23rd of April. After several intermediate voyages she was totally lost on the 9th of October, 1857.

*Held*:—First, that the concealment of the information received from the captain, that the ship had been on shore, was a concealment of a material fact which vitiated the policy.

Secondly.—That, assuming that the defendant's letter of the 22nd of January was an offer to insure on the terms therein mentioned, such offer was not shewn to have been accepted by H. and Co. or the plaintiff.

*Quære*, whether H. and Co. would have had any authority to accept such offer. *Russell v. Thornton*, 788

(3). *Till thirty Days after Arrival of Ship.—What is Arrival.*

Declaration on a policy of insurance on the barque "Shanghai," from Swan River to Mauritius, and for thirty days after arrival," averring a total loss. Plea: that the ship was unnecessarily delayed and abandoned, and deviated from her voyage. It was proved that ships bound for the Mauritius loaded with cargoes, generally speaking, go into

the harbour of Port Louis. I ballast or seeking cargo, it is customary for them to anchor at the Buoy, which is a buoy in the ocean, a few miles from the harbour itself. The "Shanghai" had sailed in ballast from Swan River to the Mauritius on her arrival anchored at the Bell Buoy and remained there fourteen days, awaiting the arrival of money to pay a tommy bond, at the expiration of which period she was wrecked. *Held*, that it was a question of fact for the jury whether the ship arrived at the Mauritius.

Per Curiam, the question is, whether it was an arrival at the place which ships of her character commonly anchor. *Lindsay and O'Neil v. Jamieson*,

#### INTERPLADER.

(1). *Appeal.*

See COMMON LAW PROCEDURE: 1854.

(2). *In County Court.—Effect*

See PRACTICE.

#### JOINT STOCK COMPANY

(1). *Joint Stock Companies* 1856, 19 & 20 Vict. c. 47—*Shareholder—Who is.*

A Company incorporated in the Joint Stock Companies Act, 1856, issued a prospectus at the end of which was a printed form of application for shares. By the prospectus it was requested that the applicant, in filling up the form, would state for which class of shares he applied, and that all applications must be accompanied by a remittance of 2l. per share deposit on the 1

ber of shares applied for, and should less number be allotted the amount paid in excess would be returned. The defendant paid into the bank of the Company 600*l.*, and filled up and sent to the directors the printed form at the foot of the prospectus as follows:—"Gentlemen,—Having paid into the hands of the bankers of the Company 600*l.*, I request you will allot me 100 shares of Class A, 200 shares of Class B. And *I hereby agree to accept such shares, or any less number*, that may be allotted to me, and to pay the future calls thereon." The directors allotted to the defendant 50 shares of Class A and 200 of Class B, and returned him 100*l.*, the balance of his deposit. A printed copy of the memorandum and articles of association, at the foot of which was a form of memorandum consenting to be a shareholder, was sent to the defendant; but it was not *signed* by him. The defendant had notice that the share certificates and interest warrants were ready, and he requested that they might be forwarded to him. His name was placed on the register of shareholders for the shares allotted to him. In an action for calls:—*Held*, that the defendant was not a shareholder in the Company. *The New Brunswick and Canada Railway and Land Company (Limited) v. Muggeridge*, 160

(2). 19 & 20 Vict. c. 47—*Shareholder*.

By the Joint Stock Companies Act, 1856, (19 & 20 Vict. c. 47), Schedule, Table B. (1.) "No person shall be deemed to have accepted any share in the Company, unless he has testified his acceptance thereof by writing under his hand in such form as the Company from time to

time directs." In July, 1856, a prospectus of a Company was issued at the foot of which was a form of application for shares. By the prospectus it was stated that all applications must be accompanied by a remittance of 2*l.* per share deposit on the number of shares applied for; and should any less number be allotted the amount paid in excess would be returned. The defendant paid to the bankers of the proposed Company 600*l.*, and filled up and sent to the directors the printed form at the foot of the prospectus, as follows:—"Gentlemen,—Having paid into the hands of the bankers of the proposed Company the sum of 600*l.*, I request you will allot me (300) shares; and I hereby agree to accept such shares or any less number, and to pay the future calls thereon." The directors allotted to the defendant (250 shares), and returned him 100*l.* the balance of his deposit. In August, 1856, a printed copy of the memorandum and articles of association, at the foot of which was a form of memorandum to be signed by a person accepting shares and consenting to be registered as a shareholder, was sent to the defendant. The Company was registered, and a certificate of incorporation was given under the Joint Stock Companies Acts, 1856, 1857, on the 25th of September, 1856. In April, 1857, the secretary of the Company wrote to the defendant that the warrant for interest on his shares was ready, and offering to forward it on receiving the articles of association signed. The defendant, by letter signed by him, applied for the interest warrant and his share certificates. The secretary wrote in answer enclosing a printed copy of the articles of association for the defendant's signature, stating that on receipt of it he would for-

ward the share certificates and interest warrants. The defendant *never signed the memorandum of consent to be a shareholder*, but his name was placed on the register of shareholders in respect of the shares allotted to him. In an action for calls:—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that, assuming it to be found as a fact that the Company had directed the acceptance of shares to be in the form appended to the articles of association, the defendant was not a shareholder in the Company. *The New Brunswick and Canada Land and Railway Company (Limited) v. Muggeridge*, 580

(3). *Action by, against Shareholder for Libel.*

A Joint Stock Company, incorporated under the 19 & 20 Vict. c. 47, may maintain an action for libel against a shareholder in the Company. *The Metropolitan Saloon Omnibus Company (Limited) v. Hawkins*, 87

JUDGMENT.

(1). *Relation of—Signing after Death.*

Judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done. Therefore, where judgment was signed at the opening of the office at its usual hour, eleven A. M., and the defendant died at half-past nine A. M. on the same morning:—*Held*, that the judgment was regular. *Wright and Another v. Mills*, 488

(2). *Charging Order on Stock.*

A judgment debtor was entitled, as sole executor and legatee under the will of D., to the arrears of a

government annuity granted for the life of D. He was also entitled as such executor and legatee to a government annuity in the name of D., but granted for his own life:—*Held*, that neither the arrears nor the annuity were chargeable under the 1 & 2 Vict. c. 110, s. 14. *Taylor v. Turnbull*, 495

(3). *On Unstamped Warrant of Attorney.*

An unstamped warrant of attorney is not available at law or in equity; and the Court will not allow it to be taken off the file for the purpose of being stamped, so as to give it a priority over a subsequent judgment creditor who has filed a stamped warrant of attorney.

In future no warrant of attorney permitted to be filed without a proper stamp. *Semple v. Nicholson*, 298

(4). *Action on—Plea.*

Matter which affords ground for a writ of error cannot be pleaded in bar to an action on a judgment. Therefore, where to an action against husband and wife, on a judgment against the wife, the defendant pleaded that she was covert when the action in which the judgment was recovered was commenced and thence until the judgment, and that her husband was not a party to the judgment or a defendant in the action:—*Held*, that the plea was bad. *Dick v. Alexandre Tolhausen and Anna his Wife*, 695

LANDLORD AND TENANT.

See LEASE.

(1). *Action for Rent by Mortgagor against his Tenant—Effect of Notice by Mortgagee not to Pay.*

In 1856, B., a mortgagor in pos-

session, agreed that he and all necessary parties would execute, and the defendant agreed to take, a lease of certain premises; the defendant, until the lease should be granted, to have the use and occupation thereof as tenant from year to year. There was a provision for payment of the costs of B. and the mortgagees. The mortgagees assented to the agreement though they were not parties to it. The defendant entered and paid rent to B. up to Michaelmas, 1857. On the 12th of December, 1857, B. assigned to the plaintiff. In April, 1858, the mortgagees gave notice to the defendant to pay the rent due to them, but no rent was in fact paid to them by the defendant. The plaintiff sued for the rent due from Christmas, 1857:—*Held*, that the notice by the mortgagees to the defendant to pay rent to them was no answer to the action for the rent due either before or since the notice. *Hickman v. Machin*, 716

(2). *Husband and Wife Letting Property Settled to Separate Use of Wife—Estoppel.*

By marriage settlement real estates were conveyed to trustees in trust to permit the wife to receive the rents to her sole use independently of her husband. After the marriage the husband let the premises to tenants, speaking of them as property in which his wife was interested. The wife received the rents during her life.—*Held*, that it was a question of fact in what character the husband let the premises, whether as agent for the trustees or as his wife's property; and that after the death of the wife the tenants were not estopped from denying that the husband had any interest, unless it was found that he let in his

own name. *Howe v. Scarrott and Sharp v. Scarrott*, 723

(3). *Tenancy from Year to Year.*

*See* MORTGAGE.

(4). *Use and Occupation—Evidence.*

*See* RENT.

LEASE.

*Forfeiture—Evidence of Non-insurance—Waiver.*

In ejectment, against a tenant for forfeiture by non-insurance, brought on the 24th of December, 1858, it was proved that on two occasions, the first a year and a half before action brought, and the second in August, 1858, the defendant had admitted that he was uninsured. On the latter occasion he stated that he wanted the money for other purposes. Notice was given to the defendant to produce the policy at the trial, which he failed to do. On the 23rd of December, 1858, the plaintiff received some rent from the undertenants of the premises, "on account of rent due at Michaelmas."—*Held*: First, that there was evidence from which a jury might presume a continuing breach of the covenant to insure on the 24th of December at the time of action brought.

Per *Pollock*, C.B., and *Martin*, B., the receipt of rent is not a waiver of a forfeiture, unless it be of rent due on a day after the forfeiture was incurred; and therefore the acceptance of rent from the *undertenants* had not the effect of a distress, so as to operate as a recognition of the existence of the defendant's tenancy on the 23rd of December when the money was received. *Price v. Woodward*, 512

## 470 LIMITATIONS. &c.

### LEGACY DUTY.

A bequest of money for the purpose of building a church and parsonage house, and of endowing and repairing the church, is subject to a legacy duty of 10% per cent. *In re William Parker, deceased.* 638

### LIBEL.

(1). *Payment into Court in Action of.*

*See COSTS.*

(2). *Against Joint Stock Company.*

*See JOINT STOCK COMPANY, (3).*

(3). *In Affidavit.*

*See DEFAMATION.*

### LIEN FOR FREIGHT.

*See CHARTER-PARTY.*

### LIMITATION OF ACTIONS ON BONDS.

3 & 4 Wm. 4, c. 42, s. 3—*Effect of Abatement of Action by Death of Obligor.*

In May 1831, the obligee of a bond brought an action upon it against the obligor. After notice of trial the action abated by the death of the obligor in December 1835. The obligor left a will, which was not proved. On the 18th May, 1857, administration of the goods and effects of the obligor with his will annexed was granted to the present defendant. In March 1852, the obligee petitioned the Insolvent

## LIMITATIONS, STATUTE OF.

Court, and his effects vested in the provisional assignee, the present plaintiff, who commenced this action on the bond against the defendant on the 15th May, 1858.—*Held*, that the right of action was not barred by the Statute of Limitations, 3 & 4 Wm. 4 c. 42 s. 3. *Sturgis, Provisional Assignee of the Estate of J. Hartig, an insolvent debtor, v. Sir W. Russell Barnard, Administrator, with the will annexed, of John Earl of Egmont.* 623

## LIMITATIONS, STATUTE OF.

### *Acknowledgment.*

In 1847, the plaintiffs, who were solicitors, lent to the defendant 100*l.* on a mortgage, 40*l.* on a promissory note, and they had also a claim against him for costs. In 1857, the defendant wrote to the plaintiffs as follows:—"Sept. 26. I wish to inform you that I received yours this morning. I am going to leave my situation on the 1st November, and when the policy is paid on the 29th October, I hope that you will have the whole of your accounts ready for me, as I hope to be with you on that day."—"Oct. 25. Mr. V., when here on Saturday, stated that the amount due against me was about 280*l.* Of course this includes the 100*l.* and interest that I had some years since, and the 40*l.* promissory note that I jointly signed with the late Mr. B. Of course you are aware that you have 25*l.* to my credit that Mr. Y. paid over when he could not complete the purchase of the property in the High Street." *Held*, a sufficient acknowledgment of the debt to take the case out of the Statute of Limitations. *Godwin v. Culley,* 373

## MALICIOUS PROSECUTION.

*Evidence of want of reasonable and probable Cause—Malice.*

On the 24th January, 1857, the plaintiff was adjudicated bankrupt. At that time he owed two poor-rates, and on the 31st January he was assessed to a third rate. On the 5th February he obtained a protection, under the 112th section of The Bankrupt Law Consolidation Act, 1849, until the 5th March, which protection was extended to the 7th April. On the 5th March all his goods were sold. In February, the rates were demanded of him by one of the defendants, who was assistant overseer, and a notice was left for payment in ten days, or legal proceedings would be taken to enforce them. On the 13th February the same defendant applied to the justices and obtained a summons in the usual form, requiring the plaintiff to appear before them for the non-payment of the rates. The plaintiff wrote upon the summons that his goods were under the protection of the Court of Bankruptcy, and the rates would be paid out of the estate, and left it at the defendant's house. The plaintiff did not appear before the justices, and they granted the usual distress warrant. This was returned nulla bona, and on the 16th March a warrant was issued by the justices commanding another of the defendants, a constable, to arrest the plaintiff and keep him in gaol for one month, unless the rates were sooner paid. On the 16th March the constable arrested him, when he produced his protection and was released. On the 23rd March he was again arrested, and kept in custody until the 7th of April, when he was discharged by order of a Commissioner of Bank-

ruptcy. *Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that there was no want of reasonable and probable cause for the arrest and no evidence of malice. *Phillips v. Naylor and Others*, 565

## MASTER AND SERVANT.

*Contract for Remuneration.*

*See WORK AND LABOUR.*

## MERCANTILE LAW AMENDMENT ACT, 1856.

*Sect. 1—Not Retrospective.*

Held in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that the 1st section of "The Mercantile Law Amendment Act, 1856," does not apply to cases where the writ of execution has been delivered to the sheriff before that Act passed. *Williams v. Smith*, 559

## MINING.

(1). *Removal of Support of Surface—Damages.*

The plaintiff was owner of a house erected in 1834 on solid ground. Previously to the building of the house a portion of the minerals had been gotten under a garden which adjoined the house. In 1838 a portion of the minerals was gotten under the defendant's land which adjoined the garden. In 1855 the defendant commenced getting out the rest of the minerals under his land. In 1857 the plaintiff's land sank, and the house was injured by the defendant's mining operations. It was found by the jury that the sinking of the plaintiff's land was caused by the defendant's workings: that some damage would have hap-

pened, but not to the same extent, if the garden ground had been left solid: that the defendant knew of the excavations under the garden: that the land would have sunk in just the same whether there was a house on it or not; and, lastly, that the damage to the plaintiff's house by the sinking was 300*l.*; 250*l.* occasioned solely by the defendant's workings, and 50*l.* damages caused in part by the excavation under the garden.—*Held*: First, that, inasmuch as the sinking of the plaintiff's land was in no way caused by the weight of the house, the plaintiff was entitled to recover whether he had acquired a right to support for his foundations by the defendant's soil or not.

Secondly, that although the excavation under the garden contributed to the extent of 50*l.* to cause the damage, the plaintiff was entitled to the whole 300*l.*, because, if the defendant had not done the wrongful act complained of, no part of the damage would have occurred. *Brown v. Robins*, 186

(2). *Surface Damage.*

See FOREST OF DEAN, (1), (2).

(3). *Under Railway.*

See RAILWAYS CLAUSES CONSOLIDATION ACT.

MORTGAGE.

(1). *Construction of—Proviso that Mortgagor shall be Tenant to Mortgagee—Notice to Quit.*

By indenture of the 23rd September, 1856, B. mortgaged to V. certain premises as a security for a loan of 2500*l.* The deed contained a power of sale in default of payment of the principal and interest

on a certain day: also a power for the mortgagees "at any time or times after such default" to enter upon the premises. The deed also contained the following provision:—"Lastly, to the intent that the said V. may have for the recovery of the interest accruing on the principal money hereby secured the same powers of entry and distress as are by law given to landlords for the recovery of rent in arrear, the said B. doth hereby attorn and become tenant from year to year to the said V. of the said premises hereby assigned, at and under the yearly rent of 125*l.*, to be paid by half-yearly payments on the 23rd March and 25th September. Nevertheless it is hereby agreed that in the event of any sale under the powers hereinbefore contained, the attornment and tenancy hereby created shall, as regards such portion of the premises as shall be sold, be at an end; and that without any previous notice to put an end to the same." By indenture of the 18th February, 1857, B. assigned by way of mortgage all his interest in the mortgaged premises to the plaintiffs, as a security for a loan of 1500*l.* By indenture of the 27th October, 1858, V. assigned his mortgage to the plaintiffs. On the 12th November, 1858, the plaintiffs gave B. notice that they had entered on the premises under the provisions contained in the mortgage deed of the 23rd September, 1856. B. refused to give up possession, and on the 25th November the plaintiffs distrained B.'s goods for rent alleged to be due up to the 25th September.—*Held*, that the clause of attornment in the indenture of the 23rd September, 1856, did not create a tenancy from year to year with all its incidents; and that the plaintiffs might maintain ejectment against B. without giving

## NEGLIGENCE.

him six months' notice to quit. *The Metropolitan Counties and General Life Assurance, Annuity, Loan and Investment Society v. Brown*, 428

(2). *Building Society—Right to Redeem, and Effect of Redemption.*

See BUILDING SOCIETY.

## MORTMAIN.

By indenture, dated in 1822, B., in consideration of 80*l.*, conveyed a house to C. and his heirs, to the use of himself for life, with remainder to the use of N. and E. (who were overseers of the parish of H.), their heirs and assigns, for ever; and it was declared that the overseers paid the 80*l.* out of parish monies, and that the premises were conveyed to them in trust to permit the same to be used as a poor house to place paupers therein belonging to the parish of H.:—*Held*, that the conveyance was not void under the statutes of mortmain. *Burnaby v. Barsby*, 699

## MUTINY ACT.

*Army Works Corps.*

The Army Works Corps, which served in the Crimea under an agreement with the Government, are not soldiers, although subject to the provisions of the Mutiny Act, 19 & 20 Vict. c. 10; and therefore they are not entitled to the certificate of discharge required by the Articles of War to be given to dismissed soldiers. *Cook v. Paxton*, 368

## NEGLIGENCE.

See ACTION ON THE CASE FOR.

VOL. IV.—N. S.

L L L

## PLEADING.

878

### PAPER.

*What is.*

See EXCISE.

### PAYMENT INTO COURT.

*Effect of, in Action of Libel.*

See COSTS, (1).

### PENALTY.

See DAMAGES, (2).

### PERPETUITY.

See RENT CHARGE.

## PLEADING.

(1). *Construction of—Certainty.*

An allegation that a party covenanted "by indenture," imports that the covenant was under seal. *Phillips v. Clift*, 168

(2). *Declaration on Case for Removal of Lateral Support.*

The second count of a declaration stated that a messuage and land, the reversion whereof belonged to the plaintiff, were in fact supported by the land adjoining: yet the defendant wrongfully and negligently dug and made divers excavations in the land adjoining without sufficiently shoring the said messuage and land, and thereby deprived them of their support, whereby they sank and were injured.—The third count stated that the plaintiff, by reason of her said interest in the messuage and land, was entitled to have the messuage supported laterally by certain land adjoining: yet the defendant wrong-

RICH.

fully and negligently dug and made divers excavations in the land adjoining without sufficiently securing the said messuage and land and thereby deprived the messuage of the support to which the plaintiff was so entitled, whereby the messuage and land sank and were injured.—*Held*, that the second count was good, although it did not allege any right to support (for as it did not appear that the defendant was the owner of the adjoining land, he must be taken to be a stranger and a wrong-doer).

*Held*, also, that the third count was good. *Elizabeth Bibby v. Carter*, 153

(3). *Plea in Bar—Proviso for Reference of Disputes to Arbitration.*

See ARBITRATION.

(4). *Plea to Action on Judgment.*

See JUDGMENT, (4).

(5). *Justification under Warrant of Justice of a Borough acting as such—Evidence—Variance.*

In trespass for breaking and entering the plaintiff's premises, the defendant pleaded a justification under a search warrant granted by a justice of the county of Stafford. At the trial, the defendant gave in evidence a search warrant granted by a justice of the borough of Wolverhampton, acting as such, but who was also a justice of the county of Stafford:—*Held*, that the evidence did not support the plea. *Webb v. Ross*, 111

(6). *Amendment of.*

See AMENDMENT.

PRACTICE

(1). *Writ of Summons for Service out of Jurisdiction—Setting aside.*

See COMMON LAW PROCEDURE ACT, 1852, (1).

(2). *Interrogatories.*

See COMMON LAW PROCEDURE ACT, 1854, (2).

(3). *Inspection of Documents by Defendant in Action for Libel.*

A shareholder in a Joint Stock Company is not entitled to an inspection of their books for the purpose of proving a plea of justification in an action against him for libel imputing insolvency to the Company. *The Metropolitan Saloon Omnibus Company (Limited) v. Hawkins*, 146

(4). *Inspection of Documents—Costs.*

There is no general rule that the costs of inspection of documents must be borne by the party seeking it, and that the costs of obtaining an order for the inspection are costs in the cause; but the Court will in its discretion order both the costs of the application and inspection to be, in any event, the costs in the cause of the party called upon to grant the inspection. *Stilwell and Another v. Ruck*, 466

(5). *Staying Proceedings after adjudication or Interpleader Summons in County Court.*

Brewing utensils, hops, &c., having been seized under a warrant of execution from a County Court against the goods of R., were claimed by one W. On the 5th of October the bailiff caused an interpleader summons to be issued, calling on the

## PROBATE DUTY.

parties to appear on the 18th, when the claim would be adjudicated upon. The County Court judge decided that the goods were the property of W. The goods having been given up, W. commenced an action against the execution creditor for damages, for wrongfully depriving him of the possession of the goods, by means whereof he was prevented from carrying on his trade as a brewer, alleging special damage. The Court refused to interfere to stay the proceedings at the instance of the defendant.

*Semble*, that the power to stay proceedings, under the 9 & 10 Vict. c. 95, s. 118, is confined to actions brought before the adjudication of the County Court judge.

*Semble*, that if the proceedings on the interpleader summons constituted a defence to the action, it should have been pleaded. *Jones v. Williams*, 706

## PRESCRIPTION ACT.

*What Rights may be acquired by Company incorporated for particular Purposes.*

See PUBLIC COMPANY.  
EASEMENT, (1).

## PROBATE DUTY.

A testator having by a valid contract agreed to sell a freehold estate for 115,000*l.*, and received a deposit of 15,000*l.* in his lifetime, the contract was specifically performed and the remainder of the purchase money paid to his executor after his death. — *Held*, that probate duty was not payable in respect of any portion of the 115,000*l.* as part of the personal estate of the testator. *The Attorney General v. John Brunning*, 94

L L L 2

## PUBLIC HEALTH ACT. 875

### PROCHEIN AMY.

. See INFANT.

## PUBLIC COMPANY.

*Incorporated by Act of Parliament for particular Purpose—Power to acquire and hold Property.*

A Company incorporated by act of parliament for the purpose of making and maintaining a canal, and having powers under their Act to take water for the purpose of supplying the canal, cannot by user acquire, under the 2 & 3 Wm. 4, c. 71, s. 2, a prescriptive right to take the water for any other purpose. *The National Guaranteed Manure Company (Limited) v. Donald and Another*, 8

## PUBLIC HEALTH ACT, 1848.

*Bye-law, Validity of—"District"—  
"Plying for Hire."*

By an order in council, the entire area, places, and parts of places comprised within the boundaries of the township of L. were constituted a "district," for the purposes of "The Public Health Act, 1848." The Blackpool Improvement Act, 1853, s. 48, empowered the Local Board from time to time to make bye-laws for (amongst other purposes) regulating the conduct of the drivers of hackney carriages, animals, &c., plying within the district, and for fixing the stands of such hackney carriages and animals. The Local Board made the following bye-law:—"That the several places in the district where painted boards shall from time to time be placed by the said Local Board to distinguish them as stands, shall be the stands for such number

of carriages, horses, asses and mules, &c., as shall be mentioned on such boards; and no driver of any such carriage, &c. shall place the same on any other than some one of such stands, or shall *ply for hire* in any of the streets or places within the said district (except on one of such stands) under a penalty not exceeding 40s. A licenced driver was convicted of "plying for hire" off a stand. On appeal, the justices stated that it was proved to their satisfaction that the appellant was driving a licenced carriage on the beach within the district: that he got off and spoke to some people and took them up having then passed a stand.

*Held*:—First, that the bye-law was valid, although it did not on the face of it specify the exact localities where the stands were to be.

Secondly.—That the sea shore between high and low water mark was within the district.

Thirdly.—That the appellant was properly convicted of "plying for hire" off a stand. *The Blackpool Local Board of Health v. Bennett. Same v. Kenyon,* 127

#### RAILWAYS CLAUSES CONSOLIDATION ACT, 1845, s. 78.

A railway Company, having purchased land for the purpose of their railway by agreement, and having taken a conveyance in the form given in the Lands Clauses Consolidation Act, 1845, Schedule (A.), and not being willing to purchase the minerals after notice of the owner's intention to work them, pursuant to s. 78 of the Railways Clauses Consolidation Act, 1845, is not entitled to the adjacent or subjacent support of the minerals; but the owner is entitled to get them notwithstanding that the getting of such minerals would cause the surface to subside.

—*Held*, accordingly, that where, under such circumstances, the Company had given notice that the working of the mines was likely to damage the works of the Company, the owner of the minerals was entitled to recover compensation which had been assessed under the 78th section. *Fletcher and Rose v. The Great Western Railway Company,* 24

#### RAILWAY COMPANY.

- (1). *Rights of in respect of Easements—Conversion of Canal into Railway.*

*See PUBLIC COMPANY.*

- (2). *Liability of for Loss of Goods forwarded on their Line by another Company.*

The plaintiff took at the Newport Station of the South Wales Railway Company a ticket from Newport to Birmingham, for which he paid the entire fare. The South Wales Railway extends from Newport to within twelve miles of Gloucester, which latter distance is traversed on the Great Western Railway; and the Midland Railway Company have a line from Gloucester to Birmingham. By arrangement between the three Companies tickets are issued for the entire distance, and the fares are divided between them according to the mileage travelled on each line. At Gloucester the plaintiff took his portmanteau from the South Wales railway carriage and delivered it to a guard of the Midland Railway Company. On the arrival of the train at Birmingham the portmanteau was missing. The plaintiff having sued the Midland Railway Company for the loss:—*Held*, that the contract was an entire contract with the South Wales Railway Company.

to convey the whole distance from Newport to Birmingham, and consequently the Midland Railway Company were not liable. *Mytton v. The Midland Railway Company*, 615

(3). *Liability of as Carriers for Accidents occasioned by Defects of Line over which their Trains run.*

See ACTION (ON THE CASE) FOR NEGLIGENCE, (1).

(4.) *Bristol and Exeter Railway Company's Act, 8 & 9 Vict. c. clv. s. 19—Charges for Conveyance on "The Railway," Junction, and Branch Railways.*

By the 6 Wm. 4, c. xxxvi., a Company was incorporated for the purpose of making a railway from Bristol to Exeter. By section 178, the Company was authorized to make such reasonable charges for the conveyance of passengers and goods on their railway as they might determine upon, not exceeding a certain sum. The 8 & 9 Vict. c. clv. empowered the Company to make a junction railway and three branch railways. The 19th section provided, that it should not be lawful for the Company to charge in respect of certain goods "conveyed on *the railway*" more than certain sums therein specified. The Company published a table of their charges for the carriage of goods. It contained an alphabetical list of various goods, divided into five classes, and "packed parcels" were to be charged of the fifth class, with 50 per cent. added to the rate. The plaintiff, a carrier, sent a "packed parcel" to be carried by the Company on their railway from Bristol to Bridgewater. This parcel contained, amongst other things, a cask of spirits, but it did not appear that any appreciable extra risk was thereby occasioned.

The Company charged for the carriage of this parcel according to the rate of the fifth class with 50 per cent. added to it. Persons, not carriers, were accustomed to send packed parcels without the additional charge of 50 per cent.

*Held*: First, that the words "the railway," in the 19th section of the 8 & 9 Vict. c. clv., applied to the whole line of railway, and not to the junction and branch railways only.

Secondly, that the charge to carriers of 50 per cent., in addition to the rate for "packed parcels," was an unequal and unreasonable charge. *Garton and Another v. The Bristol and Exeter Railway Company*, 83

(5). *Bristol and Exeter Railway—8 & 9 Vict. c. clv., s. 19—Junction and Branch Railways.*

By the 6 Wm. 4, c. xxxvi., a Company was incorporated for the purpose of making a railway from Bristol to Exeter. By section 178, the Company was authorized to make such reasonable charges for the conveyance of passengers and goods on their railway as they might determine upon, not exceeding a certain sum. The 8 & 9 Vict. c. clv. entitled "An Act to amend the Acts relating to the Bristol and Exeter Railway, and to authorize the formation of a junction railway and several branch railways connected with the same," by section 19 provided, that it should not be lawful for the Company to charge in respect of certain goods conveyed *on the railway* more than certain sums therein specified. *Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the words *the railway*, in the 19th section of the 8 & 9 Vict. c. clv., applied to the whole line, including the junction and branch railways, and not to the

junction and branch railways only.  
*Garton v. The Bristol and Exeter  
 Railway Company.* 531

#### RAILWAY AND CANAL TRAFFIC ACT.

The 17 & 18 Vict. c. 31, s. 7, which makes void all notices, conditions and declarations, made and given by a railway or canal Company, limiting their liability, unless such as the Court or the Judge trying the cause may adjudge to be just and reasonable, extends to cases where a special contract has been signed in conformity with the subsequent provision in the statute. So *Held* in the Court of Exchequer Chamber, reversing the judgment of the Court of Exchequer. Dissentiente *Erle, J.*

The plaintiff brought three horses to the cattle station of the defendants' railway at Liverpool, to be forwarded by a cattle truck to York. The defendants' servant provided a truck for the purpose, which to all external appearance, and so far as the servant knew, was sufficient for the purpose. The plaintiff signed a ticket which contained the following memorandum. "This ticket is issued subject to the owner's undertaking all risks of conveyance, loading and unloading whatsoever; as the Company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling upon the railway or in their vehicles." Two pence per mile was charged for horses laden at the cattle station. Horses so laden are forwarded in open trucks by a cattle or luggage train. At the passenger station horses are taken at the rate of four pence a horse per mile. Horses laden at this station are forwarded in horse boxes by the trains departing from the passenger station, usually passenger trains. The tickets issued by the Company

for horses forwarded by the passenger trains are similar to that signed by the plaintiff. The truck proved to be insufficient for the carriage of horses, and a hole was made in the journey, by which the horses were injured.—*Held*, by the Court of Exchequer Chamber, reversing the judgment of the Court of Exchequer: first, that the condition of the Company "would not be responsible for any injury or damage, howsoever caused," was not just and reasonable, and therefore void; secondly, that it did not protect the defendants from liability in respect of the defect in the truck. Dissentiente *Erle, J.*

Per *Erle, J.*, that the condition did not extend to wilful neglect or other misfeasance. *M. Manus v. Lancashire and Yorkshire Rail Company.*

#### REASONABLE TIME

*For Removal of Cattle from Fie  
 See DISTRESS, (2).*

#### RENT.

*Presumption from Payment of  
 Overseers of Poor.*

The defendant and his predecessors in estate had paid to the plaintiffs and their predecessors, overseers of the poor of the township of S., an annual sum of 6*l.* 1*s.* 6*d.* expressed to be for rent for common lands. It was admitted that the defendant was in possession of lands out of which the rent issued, but they were not identified, and evidence was given of their extent or value. The defendant would not produce his deeds.—*Held*, that there was evidence on which a jury might find for the plaintiff on a count for use and occupation. *Edwin Harland and John Charlesworth, Overseers*

*the Poor for the time being of the Township of Stockport, v. Lloyd Hesketh Bamford Hesketh,* 175

RENT CHARGE.

*Creation of, by way of Use—Perpetuity.*

B. being mortgagee in fee simple of certain lands, and the equity of redemption in fee belonging to Billings, by indenture of lease and release dated October 1838, between Billings of the first part, B. of the second part, T. of the third part, and H. of the fourth part, Billings did limit and appoint, and B. conveyed to H., and Billings confirmed, the said lands, to have and to hold the same to H., his heirs and assigns, to the use of H., his heirs and assigns, for ever, subject to a proviso for redemption by Billings, his heirs, &c., on payment of 5000*l.* Amongst other provisos there was one, that if default should be made in payment of the 5000*l.* it should be lawful for H., his heirs and assigns, to sell. This deed contained a proviso for quiet enjoyment by Billings until default. Also the following:—"Provided always, and it is hereby expressly agreed and declared between and by the parties hereto, that if at any time hereafter, when and so soon as H. and every other person claiming or to claim by, from, through or under him, shall, under or by virtue of any power or authority herein contained, enter into or upon or otherwise become possessed of the said premises, or any part thereof, the same shall from thenceforth be subjected and be charged to and with the payment to Billings and his assigns of the annual sum of 40*l.*; and the same shall thenceforth be recovered or recoverable by distress or otherwise upon or out of

the mortgaged premises." This conveyance was executed by B. and Billings, but not by H. Default having been made in payment, H. entered into possession for the purpose of exercising the power of sale. And by indenture, dated in 1847, he conveyed to one A. T., who entered into possession of the lands and duly paid the 40*l.* rent.

*Held*:—First, that the charge of the rent of 40*l.* a year was not a good reservation of a rent, inasmuch as it was in favour of a person not having a legal estate in the land.

Secondly.—That there was no creation of a rent charge good at common law, because the releasee in fee simple did not execute the deed of 1838.

Thirdly.—That the rent was well created by way of use under the statute.

Fourthly.—That the declaration of this use, though after the limitation of the estate to H. and his heirs and assigns, to the use of H., his heirs and assigns, was not open to objection as being a use upon a use.

Fifthly.—That, assuming that the rent might arise at any time however distant, the limitation was not void for remoteness as tending to a perpetuity. *Gilbertson v. Richards and Others,* 277

REVENUE.

*See* INCOME TAX.  
LEGACY DUTY.  
PROBATE DUTY.  
SUCCESSION DUTY ACT.

REVERSIONER.

*Action for Damages to Reversionary Interest in Chattels.*

*See* ACTION (ON THE CASE)  
AGAINST SHERIFF.

## SALE OF GOODS.

See CONTRACT, (3).

*Crop of Oil to be grown and put into Vendee's Bottles—Vesting of Property.*

In January, 1858, C. agreed to sell to the plaintiff all the crop of oil of peppermint grown on his farm in that year at 21s. per pound. In September C. wrote to the plaintiff for bottles to put the oil in. The plaintiff sent the bottles, and C. having weighed the oil put it in the plaintiff's bottles, labelled them with the weight, and made out invoices. Before, however, he had completed the filling of the bottles he sold and delivered several of them to the defendant. The plaintiff had for many years past bought of C. his crop of oil of peppermint, and it was usual for C., when the bottles were filled, to deliver them to a carrier to take to a railway station. In detinue, by the plaintiff against the defendant, for the bottles of oil of peppermint delivered to him:—*Held*, that the putting the oil in the plaintiff's bottles was an act of appropriation which vested the property in the plaintiff. *Elizabeth Langton v. Higgins*, 402

## SHERIFF.

See ACTION ON THE CASE (AGAINST).  
ESTOPPEL, (3)..

*Withdrawal of Writ after Execution*  
—Countermand.

P. having recovered judgment against F., the sheriff, on the 15th of April, seized F.'s goods in Hampshire, under a fi. fa. in that action, and left a man in possession. On the same day F. executed a bill of sale to W., and a writ of fi. fa., in an

action by W. against F., was lodged with the sheriff for execution. On the 1st of May, F. was taken in Middlesex under a writ of ca. sa. issued at the suit of P., and thereupon P.'s attorney, at Southampton, immediately wrote to request the sheriff to withdraw from possession under the ca. sa. The officer received the letter, but his man continued in possession of the goods and did not in fact withdraw. The officer however told W. that he would hold for him under his writ. A summons to set aside the writ of ca. sa., on the ground that it had been irregularly issued, "no return to the fi. fa., under which the sheriff now holds the defendant's property having been made," was taken out on the 3rd of May, and on the 4th F. was discharged out of custody, and an order was made by consent that P. should be at liberty to proceed on the fi. fa. under which the sheriff is in possession." The summons was taken out and the consent to the order given by R., the London agent of W., who was the attorney for F. in the action of P. v. F., upon F.'s instructions. W. knew nothing about the terms of the order at the time it was made, and when he heard of it took no steps to inform P. that he objected to it, or that it was made without his authority.—*Held*: That the sheriff's officer having continued in actual possession under P.'s writ, and the direction to the sheriff to withdraw having been countermanded before it was actually obeyed, W. acquired no right to the goods seized as against P.

Per *Pollock*, C. B., and *Martin*, B., that W. was bound by the statement, "that the sheriff was in possession," contained in the order made in the cause of P. v. F., and consented to by R. as the London agent of W.

Per *Bramwell*, B., and *semble* per *Channell*, B., that the statement of fact in the order was not binding on W. as evidence against him, in his private capacity, of the fact stated in it, by reason merely of his London agent having consented to it, and therefore that the admission did not affect the question of his title to the goods as against P. *F. R. Withers v. Isabella Parker, Executrix of G. S. Parker*, 524

SHIPPING.

- (1). *Agency of Master in forwarding Cargo after total Loss and Abandonment of Ship.*

See INSURANCE (MARINE).

- (2). *Bill of Lading — Lien for Freight.*

See CHARTER-PARTY.  
INSURANCE (MARINE).

STATUTE.

*Operation—Not retrospective.*

See BOND.  
MERCANTILE LAW AMENDMENT  
ACT, 1856.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS.

SUCCESSION DUTY ACT.

*Predecessor—Joint Predecessor.*

Upon an information by the Attorney General to recover succession

duty, payable in respect of the succession of one E. to a sum of 2000*l.* derived from W. P. as predecessor, a special verdict was found, which stated that J. P. died intestate leaving W. P., his brother; and A. S., the wife of J. H. S., claimed to be a daughter of a sister of J. P. That by indenture, reciting that letters of administration had been granted to W. P., and in order to obviate any doubts or differences which might arise touching any share which J. H. S. or A. S. might be entitled to in the personal effects of J. P., W. P. had proposed and agreed on having a general release from J. H. S. and A. S. to transfer 30,000*l.* to be settled upon trusts for J. H. S. and A. S. and the children of their marriage, to which proposal J. H. S. and A. S. had consented and agreed; that the sum of 30,000*l.* had been directed to be transferred to trustees by W. P., and that J. H. S. and A. S. had that day executed a general release to W. P. of all claims against him as administrator of J. P. or otherwise; it was declared that B. and O. should stand possessed of the 30,000*l.* in trust to pay the interest to J. H. S. for life, and after his death to A. S. for her life, and after the death of the survivor, if there should be an only child in trust for such child, and if there should be two or more children in trust for such children in such shares as J. H. S. and A. S., or the survivor, should appoint; and in case no child should live to attain a vested interest in trust for the survivor of J. H. S. and A. S. absolutely. Contemporaneously with the indenture a release was executed by J. H. S. and A. S. to W. P. There were ten children of the marriage, and J. H. S. and A. S. having appointed a sum of 2000*l.* to E. one of such children, J. H. S. and A. S. died in or before

March 1854.—*Held*, that the defendant was entitled to judgment, because it could not be inferred that W. P. was either the sole predecessor of E. within the meaning of s. 2, or a joint predecessor within the meaning of s. 13. *Dubitante Ohannell, B.*

Per *Watson, B.* that J. H. S. and A. S. were the settlors. *The Attorney General v. Baker and Platt*, 19

### THEATRE.

A booth-theatre, which is taken to pieces and carried from place to place for theatrical performances, is not a "house or other place of public resort for the public performance of stage plays" within the meaning of the 2nd section of the 6 & 7 Vict. c. 68. *Davys, Appellant, Douglas, Respondent*, 180

### TIME.

*For Performance of Judicial Acts.*

See JUDGMENT, (1).

### TRESPASS.

(1). *Assault and Battery, what Amounts to.*

A person cannot justify giving another into custody for merely laying hands on him to attract his attention, provided it be not done hostilely. *Coward v. Baddeley*, 478

(2). *False Imprisonment—Evidence.*

A felony having been committed, the defendant sent for a policeman, who, on the defendant's information, and on inquiries made by himself, arrested the plaintiff. The defendant accompanied the policeman to the station and signed the charge

sheet.—*Held*, that the defendant was not liable in an action of trespass. *Grinham v. Willey*, 496

(3). *Ca. sa. on Judgment for less than 20l.*

A defendant who is taken in execution under a writ of *ca. sa.* issued on a judgment for less than 20l., without the order of the Judge who tried the cause, may maintain an action of trespass against the plaintiff and his attorney, although the writ has not been set aside. *Brooks v. Hodgkinson and Butt*, 712

(4). *For False Imprisonment on Charge of Misdemeanor—Justification—Constable.*

A police constable having imprisoned the plaintiff in a cell, on a charge of aiding another person in assaulting him in the execution of his duty, some hours afterwards the defendant, the chief constable, arrived at the station, and on the report of another constable, without inquiring into the facts, handcuffed the plaintiff and took him before the magistrates, who dismissed the charge:—*Held*, that the defendant, in order to justify himself, was bound to shew that the charge was well founded, and that, having failed to do so, he and all other persons concerned in the imprisonment of the plaintiff were liable in trespass. *Griffin v. Coleman*, 265

(5). *Justification—Defect of Fences.*

See DISTRESS, (2).

### USES AND TRUSTS.

*Use upon a Use.*

See RENT CHARGE.

## VOLUNTARY PAYMENT.

*Money had and received—Money paid.*

The plaintiff, a merchant at Liverpool, employed P., a commission agent at Manchester, to purchase goods for him. P. purchased goods of various persons, and amongst them, of W. and Co. P. made out invoices in his own name, and drew upon the plaintiff for the amount. There being a balance of 180*l.* 7*s.* 7*d.* due from the plaintiff for goods bought of W. and Co., the plaintiff accepted a bill of exchange drawn by P. for payment to his order of that amount at three months date. P. not having paid W. and Co. they claimed payment from the plaintiff, but he denied all knowledge of them in the matter. P. became bankrupt. At that time the bill of exchange was in his hands and was taken possession of by his official assignee who indorsed it and deposited it in a bank, pursuant to the provisions of the Bankrupt Law Consolidation Act, 1849. When the bill became due, it was presented by the bankers and paid by the plaintiff. W. and Co. afterwards sued the plaintiff for the goods sold by them, and the plaintiff compromised the action. The plaintiff then brought an action against the official assignee to recover the amount of the bill.—*Held*, that the plaintiff could not recover either for money had and received or money paid to his use. *Barber v. Pott*, 759

WARRANT OF ATTORNEY  
UNSTAMPED.

*See JUDGMENT, (3).*

## WAY.

*Presumption of Order of Justices for Stopping.*

*See INCLOSURE ACT.*

## WORK AND LABOUR.

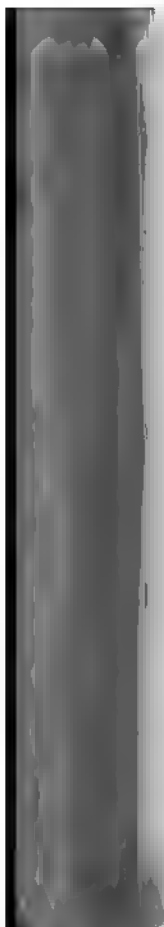
*What is Evidence—Contract to pay for.*

The plaintiff wrote to the defendant as follows:—I agree to accept the appointment of secretary of the Lancashire Cotton Mill Company upon the following terms, viz., first, a salary of 300*l.* per annum, commencing at the present date, if the Company be completely registered and put into operation; if not, I shall be satisfied with any remuneration for my time and labour you may think me deserving of and your means can afford." The defendant wrote in answer accepting the terms, and adding,—“It is distinctly agreed and understood that if the Company is not formed and carried out, that part of your letter which alludes to your salary be null and void, and that at the expiration of three months it is entirely left to me to give unto you such sum of money as I may deem right as compensation for labour done in the event of the Company not being carried out.” The plaintiff rendered some service, but the Company was never formed.—*Held*, that there was no contract upon which the plaintiff could recover any part of the salary. *Roberts v. Smith*, 315

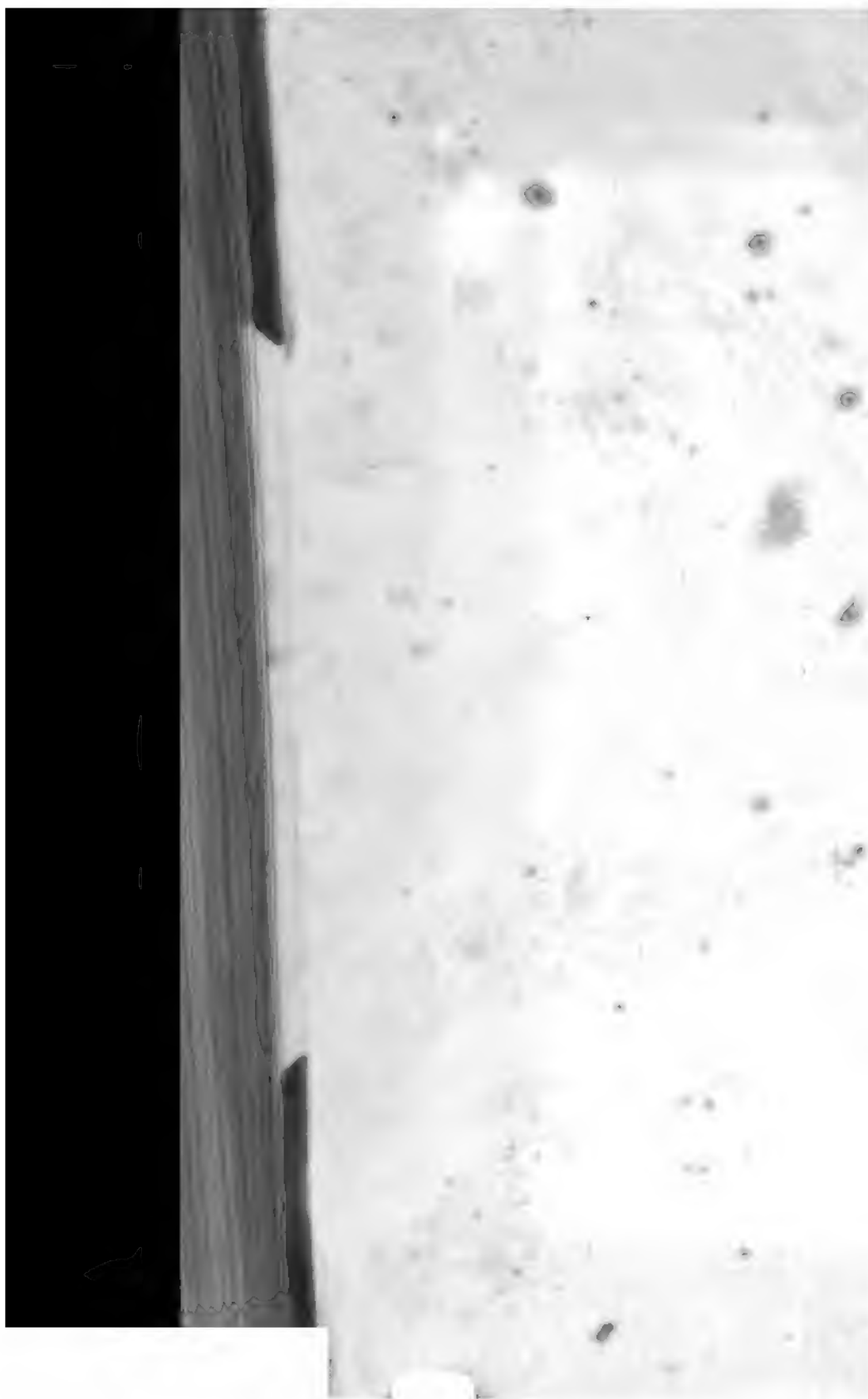
THE END.

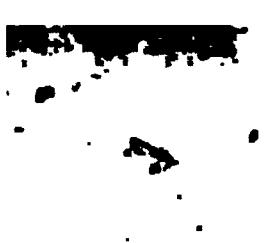












—

